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WISCONSIN REPORTS

143

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MAY 24—NOVEMBER 15, 1910

FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
CALLAGHAN AND COMPANY
1911

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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JOSHUA ERIC DODGE
(Until September 1, 1910)
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES
AAD J. VINJE
(From September 10, 1910)

Attorney General - - FRANK L. GILBERT

Clerk - - - CLARENCE KELLOGG

MEMORANDUM.

Mr. Justice VINJE took no part in the decision of the cases reported in this volume on pages 1 to 281 inclusive.

ERRATA.

VOL. 142.

Page 199, line 24. For Rock county, read Rusk county.

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IN MEMORIAM.

ALLEN R. BUSHNELL.

On the 24th day of May, 1910, Mr. J. W. Murphy of Platteville addressed the court and presented the following

Memorial of the Bar of Grant County.

May it please the Court:—ALLEN R. BUSHNELL, who was a member of the bar in practice at this court for more than fifty years, is dead; and it is fitting and proper that we meet here to offer our tribute to his memory and place upon the records of this court some enduring testimonial to so eminent a member of our profession.

Mr. BUSHNELL was born on his father's farm at Hartford, Trumbull county, Ohio, July 16, 1833, and died at Madison, Wisconsin, March 29, 1909. His father, Dr. George W. Bushnell, and his mother, Sally Bates Bushnell, were natives of Connecticut who emigrated to the Connecticut Reserve in 1824.

His education was obtained in the schools of his native town and at Oberlin and Hiram colleges. He came to Wisconsin in 1852 as a teacher, and later studied law in the office of Judge Stephen O. Paine at Platteville. He was admitted to the bar here in Lancaster December 1, 1857. The same year he opened an office at Platteville in this county, and until the time of his death remained one of the prominent lawyers of the state.

When Mr. BUSHNELL entered the bar of this circuit his associates were men of more than average ability. They were leaders among the men who laid the foundations upon which the greatness and prosperity of the state was grounded and to whom we are indebted for the splendid institutions, wise legislation, and well considered decisions which have made her justly renowned. It was no holiday to engage in the practice of the law when his opponents were such men as Judge Charles Dunn, M. M. Cothren, J. T. Mills, J. Allen Barber, Stephen O. Paine, Moses M. Strong, Alexander Wilson, and William E. Carter, men who have all gone on before him. Among these his contemporaries he has earned an honored place. He has added luster to the bar of his circuit, and his career is one in which the surviving members of that bar can feel an honest pride.

In 1860 he was elected district attorney of Grant county, and had just entered on the discharge of his official duties when the nation was startled by the call of the President for volunteers to put down

the rebellion. Resigning his office in 1861, he assisted in recruiting Company C of the 7th Wisconsin Infantry and was chosen first lieutenant. That regiment became a part of the immortal Iron Brigade, and he served with that brigade until 1863, when he was discharged for disability incurred in the service, having in the meantime risen to the rank of captain.

After a year spent under the care of his father, who was an eminent physician, he returned to Wisconsin, and in 1864 located at Lancaster and was immediately appointed district attorney.

In 1872 he was elected a member of the Wisconsin Assembly, and in the year 1878 was elected mayor of the city of Lancaster, being the first occupant of that position.

In 1886 he was appointed United States district attorney for the Western district of Wisconsin, and served four years in that capacity; and in 1890 was elected representative in Congress from the Third Wisconsin district.

In 1891 he removed to Madison and resided there until 1901, when he returned to Lancaster, where he remained until 1908, when he again removed to Madison, but he always retained his connection with the law business at Lancaster.

After his return from Congress, in 1894 he assisted in organizing the Wisconsin Life Insurance Company, of which he was an official and counsel until his death.

In every official position to which he was called he acquitted himself with honor, and was distinguished for his unselfish devotion to the public welfare.

But while his official career is a matter of interest to all his friends and associates, it is his career as a lawyer that especially appeals to his associates at the bar. It was in that intercourse through close business relations and in the actual arena of conflict that we learned to know and appreciate the man and his ability.

He was a man of sterling character, amiable and sociable in disposition and courteous in manner. His preparation for the bar was thorough. He was always studious, methodical, and persistent. Self-reliant, cool, and collected under all circumstances, he was a wise counselor, and, though not a fluent speaker, he became an effective advocate and was always a dangerous adversary.

The financial return for his labor was a matter of little concern to him, and his time and ability were always at the service of those in need. The solution of the legal question involved, the prevention of wrongs or the protection of rights as he saw them, were always of more importance to him than the fees which the controversy might bring.

He came to the bar when the law in this state was in a formative condition, and to his assistance the courts and his successors at the

bar are indebted for the elucidation of many of the principles that now determine the rights of parties.

The extensive practice that he enjoyed in the courts of the state and the federal courts is ample evidence that his ability as a lawyer was appreciated. He had an abiding belief in the dignity of the legal profession and the courts. He could not countenance that modern view that would lower the profession from the high position it occupied in his younger days. He belonged to a generation in which the courts were the forums where the rights and liberties of man were protected, a generation that has left a lasting impress on our jurisprudence; and he was one of the strong men of that generation.

In his early days Mr. BUSHNELL was a Republican in politics. He was raised in a community where slavery was detested. His father's house was a station on the "underground railroad," and from it many a slave was guided toward the north star and freedom. His first vote was naturally cast for the Republican party, which had just come into existence when he arrived at manhood. In later years he found himself at variance with ideas that were gaining ascendency in that party, and in 1876 he cast in his lot with the Democratic party and remained with it till his death, believing that the principles advocated by that party would best promote the permanent welfare of the people. His ability was at the service of the party in every vicissitude of its fortune. He was a trusted leader and adviser in its councils, and was honored by every reward that it was in its power to give.

He was true to every duty and relation in life. He will be missed by all his friends and associates, but the members of the bar who know him best will miss him most; and by them he will be long remembered as a man strong in all that goes to make good citizenship, as a good lawyer, and a true friend.

And as a further testimonial of respect to his memory,

Resolved, that we, the members of the bar, mourn his loss, and respectfully request that this memorial be spread upon the records of this court, and that the same be also presented to the supreme court of the state.

J. W. MURPHY.
JOHN G. CLARK.
E. M. LOWRY.

On behalf of the court, Mr. Chief Justice WINSLOW responded as follows:

The death of Mr. BUSHNELL closed a long, useful, and eminently honorable career. As a citizen, a soldier, a legislator, and a member of the bar he met the duties and responsibilities of life, and in all these capacities he acquitted himself like the true man which he was.

We may not say that he was a man of genius, but he certainly pos-

sessed the more desirable qualities of courtesy, integrity, and unflagging industry; combined with these there was intellectual ability of a high order and entire devotion to duty. He possessed and well deserved the confidence of his fellowmen; in the community where he passed the greater part of his professional life he was regarded as the leader of the bar, whose advice was to be depended upon and whose services in legal matters were greatly to be desired.

His practice in this court was not as large in volume as that of some of his brethren, but his cases nearly always presented questions of delicacy and importance, and his briefs as well as his oral arguments demonstrated a lawyerlike grasp of the subject as well as careful and industrious preparation.

He belonged to a generation of lawyers nearly all of whom have now passed from the stage. Generally speaking they were gentlemen of ability, integrity, and courtly manners, and were imbued with a high sense of the dignity of the profession.

He was somewhat too deliberate and ceremonious perhaps to attain great success in these days of stenography and speed, but still he presented a refreshing picture of the oldfashioned lawyer whom commercialism had not reached and who still retained the dignified ways and high ideals which marked a more leisurely and courtly generation of the bar.

He will be missed at his home, he will be missed in the trial courts, and he will be missed here; but the memory of his amiable qualities and solid worth as a citizen and as a lawyer will be long preserved.

JOSHUA STARK.

Mr. F. C. Winkler of Milwaukee then presented the following

Memorial of the Milwaukee County Bar.

May it please the Court:—The committee appointed for that purpose presents to the Milwaukee Bar the following notice commemorative of the late Mr. JOSHUA STARK, whose career as a member of this body has in length of years, in great and varied activity, and in honorable and efficient professional services not been exceeded by that of any other man.

MR. STARK was born on the 12th of August, 1828, at Brattleboro, Vermont, the son of Rev. J. L. and Hannah G. Stark, natives of Connecticut. He pursued preparatory studies in Herkimer and Little Falls, New York, and in the spring of 1846 entered Union College, Schenectady, joining the sophomore class, with which he graduated in 1848. His aim was to be a lawyer, and he applied himself diligently to the study of that profession at Little Falls, and was admit-

ted to the bar by the supreme court of New York at a general term at Watertown in July, 1850. He came to Wisconsin in the fall of the same year and settled at Cedarburg, a struggling pioneer hamlet about twenty miles from Milwaukee, entering into a partnership with Mr. Fred W. Horn, the able and leading man of the German immigrants who had taken possession of that town and its vicinity.

While clients proved few, Mr. STARK owed to his short residence there the acquisition of the German language to a degree of fluency and perfection which few native Americans have ever possessed.

He removed to Milwaukee the following May. Here he soon found ample employment. He entered at once upon an active practice which continued unintermittently throughout his career. He was elected city attorney in the spring of 1853, and in the fall of 1855 member of the state legislature. In 1860 he was elected district attorney of Milwaukee county, an office which he held through 1861 and 1862. Both as a legislator and as district attorney he found occasion to render very signal public services. In 1873 he was employed to prepare a revision and consolidation of the city charter and the ordinances of the city, a work which he performed with his characteristic industry and accuracy to very general satisfaction.

Mr. STARK was always a strong friend of our public school system and gave to the schools of Milwaukee many years of devoted work. He was first elected a member of the school board in 1871. In 1875 he was elected president of the board, and he continued to hold that place by successive annual elections until the summer of 1884 when he retired from the board. His devoted, conscientious, and very able services here have proved of lasting benefit to Milwaukee's public schools. These services won for him the strongest commendations from many sources, among others from the body of teachers of the Milwaukee schools, who spoke of him in a public address as one of "the strongest and ablest supporters of the public school system," and added: "Especially have you deserved and secured our confidence and esteem through your unflagging efforts to ennoble the work of the teacher and lift it to the dignity of a profession."

Politically Mr. STARK has been affiliated with the Democratic party. But he was in no sense a partisan. Adhesion to party for the party's sake did not appeal to his sense of justice. He was always guided on public questions by his own independent judgment.

A public-spirited citizen, Mr. STARK gave active aid to many enterprises and rendered many services of a public character to which no allusion has here been made. The chief work of his life, however, was that of his profession, extending as it did over a period of nearly sixty years. As a lawyer Mr. STARK was a man of ripe scholarship and of thoroughly trained intellect. He reasoned clearly and pursued his course with rare persistency. He was an indefatigable

worker. His attention to detail could not possibly be exceeded. Nothing that his case presented, nothing that could be discovered to fortify or elucidate his contentions, seemed ever to escape him. Not naturally an advocate, the thoroughness of his preparation, the perfect possession of every fact, his clear understanding of the law, and the persistency with which he presented and pushed his convictions, enforced attention and made him a strong man at the bar of the court; and they had their effect with juries, too, in cases at least where facts had to rule to the exclusion of emotion. His professional labors have been very great, embracing the smallest every-day work as well as the conduct of highly important litigation. His name appears very frequently in the reports of our supreme court, and his briefs and arguments presented there, replete with his thorough learning and marked by very industrious research, were invariably of the highest value. He was kind and helpful to young lawyers and is remembered by all his associates with the highest regard. Thus he lived the life of an honored and distinguished citizen who held a prominent place in the front rank of the legal profession.

Mr. STARK was married at Milwaukee to Miss Kate Augusta Kissam on the 26th day of April, 1855. He died at his home in that city on the 9th day of February, 1910, survived by his widow and two children, Mr. Frank G. Stark of Rochester, New York, and Mrs. August E. Inbusch of Milwaukee.

Mr. Justice TIMLIN responded, on behalf of the court:

A large part of the long life of JOSHUA STARK was spent in the practice of his profession, in which he achieved uncommon distinction for learning and integrity. His dominant traits of character were steadfastness and perseverance. He held fast to the beliefs of his ancestors and never swerved from the professional path which he had in early life marked out for himself. His life's span covered a time of material progress and of great enterprise, the record of which is of vastly more importance to mankind than the ordinary tales of wars and dynasties. He saw many changes and met many chances for wealth and distinction outside of his profession. He saw the many tribes of alien blood and hostile creeds swarm and hive and dwell together in amity about the borders of the Great Lakes. He saw these take up and carry on the problems of self-government and maintain and direct the system of popular education as if "to the manor born;" and he saw their children mingle their blood in the formation of a new race from which much may be expected. The wilderness was transformed into their cultivated fields and their homesteads, and the cities with their useful arts and their luxuries sprang into existence or grew into greatness like the creations of fancy. The wagon train and the forest trail were trans-

formed into the railways of commerce, the work of the courier was done with the swiftness of thought by the electric telegraph and telephone. The automobile succeeded the ox wagon.

He also lived to see the first faint beginnings of the reaction from privation to the pursuit of pleasure, from heroism to hedonism—the banquet after the battle. Steadfastly he put aside or neglected the unprecedented opportunities which these transitive conditions presented for the acquisition of wealth, and these temptations to abandon a profession in which the ratio of pecuniary reward to work was comparatively small. He kept his resolute course

> "constant as the northern star,
> Of whose true-fix'd and resting quality
> There is no fellow in the firmament."

He lived long, worked hard, and died without great store of wealth but rich in honor. We accord him the honor which is his and wish him the peace he well deserves.

CASES DETERMINED

AT THE

January Term, 1910.

THORNDIKE and others, Appellants, vs. MILWAUKEE AUDITORIUM COMPANY and another, Respondents.

November 16, 1909—May 24, 1910.

Platting lands: Public squares: Dedication: Interest left in dedicator: Curative statute: Trusts: Diversion or misuser of property: Who may maintain action: Taxpayers' action: Pleading.

1. A plat duly acknowledged and recorded under the act of the territory of Michigan of April 12, 1827, conveys the fee in trust of a public square designated on such plat, and leaves no present interest in the dedicator or in his heirs or grantees in such land.
2. A statutory dedication by such platting has the legal effect of a conveyance in fee in trust for the public.
3. A defective statutory dedication, if accepted by the public, is good as a common-law dedication.
4. A common-law dedication of land for public uses conveys an easement in the public sufficient for such purposes, but leaves the fee in the dedicator.
5. Under sec. 2263, R. S. 1878, a statutory dedication which conformed to the statute or which, failing so to conform in minor particulars, was corrected by a curative statute (ch. 348, Laws of 1883), passed the fee in trust for the public to the town, city, or village and left no present interest in the dedicator or his heirs in case of a public square.
6. It is the settled law of this state that in the case of a road or street, whether acquired by condemnation, by conveyance, by common-law dedication, or by statutory dedication, the city, town, or village takes only an easement for highway purposes, while the fee is held by the abutting owners. This brings all

roads and streets within an uniform rule and has become a rule of property; but this rule will not be extended to public squares which have become such by statutory dedication.

7. Public squares created by statutory dedication under sec. 2263, Stats. (1898), and accepted by the public belong to the city in fee in trust for the public, and the dedicator or his heirs have no present interest in the land. *Milwaukee v. M. & B. R. Co.* 7 Wis. 85, so far as it holds to the contrary, overruled.

8. Where the plaintiffs have no interest differing from that of any other member of the public in preventing misuser of such public square, they cannot maintain an action in their own right as heirs of the dedicator.

9. The misuser or diversion of trust property does not operate to forfeit the title of the trustee, in the absence of any such express condition in the conveyance to the trustee.

10. The remedy in such case is a suit in equity by the proper party plaintiff to restrain the unlawful diversion or the misuser of the trust property. Public trusts like those created by the statutes referred to must be enforced in the same manner and by the same persons as are entitled to enforce charitable trusts.

11. One who has no interest differing from that of any other member of the public in preventing the misuser of such trust property cannot maintain a suit in his own right for the purpose of preventing misuser.

12. Where a complaint contains no averment that the action is brought in behalf of the plaintiffs and others similarly situated with respect to the subject matter of the action, and fails to show that the right sought to be vindicated is a public right to which the whole body of the taxpayers only are entitled, but on the other hand sets forth the ownership of the land in question and its platting by the ancestor of the plaintiffs, traces the title from such ancestor, and then avers the diversion or misuser of the trust property apparently as a private wrong to plaintiffs, the action will not be sustained as a class action or an action in behalf of the public, the beneficiaries under the trust mentioned.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Frank M. Hoyt, for the appellants, contended, *inter alia,* that the appellants as heirs of the dedicator could maintain this action: *Warren v. Lyons City,* 22 Iowa, 351; *Rowzee v. Pierce,* 75 Miss. 846, 23 South. 307. A resident taxpayer could maintain the action. *McIntyre v. Board of Comm'rs,*

15 Colo. App. 78, 61 Pac. 237; *Crampton v. Zabriskie,* 101 U. S. 601; *Davenport v. Buffington,* 97 Fed. 234; 2 Dill. Mun. Corp. (4th ed.) §§ 653, 914. A municipality cannot use, for purposes foreign to the dedication, lands dedicated for a public park. *Riverside v. MacLain,* 210 Ill. 308, 71 N. E. 408; *Sachs v. Trustees,* 79 Ill. App. 439; *Board of Ed. v. Kansas City,* 62 Kan. 374, 63 Pac. 600; *Portland & W. V. R. Co. v. Portland,* 14 Oreg. 188, 12 Pac. 265; *St. Paul v. C., M. & St. P. R. Co.* 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458; *Price v. Thompson,* 48 Mo. 361; *Fessler v. Union,* 67 N. J. Eq. 14, 56 Atl. 272, affirmed 68 N. J. Eq. 657, 60 Atl. 1134. The objection that the complaint was not brought on behalf of plaintiffs and all taxpayers similarly situated was waived by failure to specifically demur on that ground. *State v. Tuttle,* 53 Wis. 45, 9 N. W. 791; *Wood v. Union Gospel C. B. Asso.* 63 Wis. 9, 22 N. W. 756; *Manseau v. Mueller,* 45 Wis. 430; *Cawker v. Milwaukee,* 133 Wis. 35, 113 N. W. 417. Public property cannot be used for the purposes here sought. *Att'y Gen. v. Eau Claire,* 37 Wis. 400; *Wisconsin K. Inst. v. Milwaukee Co.* 95 Wis. 153, 70 N. W. 68; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067; *State ex rel. Consolidated S. Co. v. Houser,* 125 Wis. 256, 104 N. W. 77; *Brodhead v. Milwaukee,* 19 Wis. 624; *Weeks v. Milwaukee,* 10 Wis. 242; *Foster v. Kenosha,* 12 Wis. 616. The city acquired no right by adverse possession because the land had been dedicated to the use of the public. *Childs v. Nelson,* 69 Wis. 125, 33 N. W. 587; *Nicolai v. Davis,* 91 Wis. 370, 64 N. W. 1001; *Madison v. Mayers,* 97 Wis. 399, 73 N. W. 43; *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101.

For the respondent *Milwaukee Auditorium Company* there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles, Jr.,* of counsel, and oral argument by *J. V. Quarles, Jr.*

For the respondent *City of Milwaukee* there was a brief

by *John T. Kelly,* city attorney, and *Walter H. Bender,* assistant city attorney, of counsel, and oral argument by *Mr. Bender.*

On the part of the respondents the following authorities, among others, were cited. As negativing the right of the plaintiffs to maintain this suit as heirs of the dedicator: *Strong v. Doty,* 32 Wis. 381; *Mills v. Evansville Sem.* 47 Wis. 354, 2 N. W. 550; *Donnelly v. Eastes,* 94 Wis. 390, 396, 69 N. W. 157; *Greene v. O'Connor,* 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262, and note; *Adams v. First Baptist Church,* 148 Mich. 140, 111 N. W. 757, 11 L. R. A. N. S. 509, and note; *Barclay v. Howell's Lessee,* 6 Pet. 498; *Williams v. Milwaukee Ind. Expo. Asso.* 79 Wis. 524, 48 N. W. 665; *U. S. v. Ill. Cent. R. Co.* 154 U. S. 225, 14 Sup. Ct. 1015; *Zettel v. West Bend,* 79 Wis. 316, 48 N. W. 379. To the point that appellants, not being specially injured or damaged, cannot maintain this suit as a class action: *Manson v. South-Bound R. Co.* 64 S. C. 120, 41 S. E. 832; 2 High, Injunctions (4th ed.) § 1301; *Williams v. Milwaukee Ind. Expo. Asso.* 79 Wis. 524, 48 N. W. 665; *Bell v. Platteville,* 71 Wis. 139, 36 N. W. 831; *Stone v. Oconomowoc,* 71 Wis. 155, 36 N. W. 829. That the legislature, lawfully representing the public beneficiary, could authorize a change of the use where no property was taken and no private rights infringed: *Prince v. Crocker,* 166 Mass. 347, 44 N. E. 446; *Charles River Bridge v. Warren Bridge,* 11 Pet. 420; *Brooklyn Park Comm'rs v. Armstrong,* 45 N. Y. 234; *Clark v. Providence,* 16 R. I. 337, 15 Atl. 763; 2 Dill. Mun. Corp. (4th ed.) § 651.

TIMLIN, J. The complaint in this action averred that the plaintiffs are the sole heirs at law of Byron Kilbourn, who died testate on December 16, 1870, leaving surviving him his widow, Henrietta, and his son, Byron H. Kilbourn. His will, which was duly admitted to probate, after devising

and bequeathing a life estate in certain real property and some personal property to his widow, devised and bequeathed all the rest, residue, and remainder of his estate one half to Byron H. Kilbourn and the other half to I. A. Lapham in trust for the plaintiffs. In the year 1897 Byron H. Kilbourn died intestate leaving surviving him the plaintiffs, his only heirs at law. Henrietta died, and the trust to I. A. Lapham has long since been executed and the property which was the subject of that trust conveyed to the plaintiffs. The plaintiffs also averred that they own two described lots within the limits of the plat hereinafter mentioned and situate a short distance from the public square in question, but it does not appear that these lots abut on that square or on the streets in front of that square. One of the plaintiffs is a resident of *Milwaukee*. There is no averment that the suit is brought in behalf of the taxpayers of the city, no averment that either of the plaintiffs is a taxpayer, and that fact could only be deduced from the averment that plaintiffs own real estate in the city of *Milwaukee*. This averment is, however, inserted in the complaint for a wholly different purpose, namely, to show the interest of the plaintiffs in preserving the original dedication by reason of their ownership of lots in the plat as well as by force of their succession to the rights of Byron Kilbourn through their father and through execution of the Lapham trust. It is averred that on October 8, 1835, Byron Kilbourn, being the sole owner in fee simple of fractional government lots 3 and 4 in the N. E. ¼ of section 29, township 7 N., of range 22 E., in Milwaukee county, made and recorded a plat of these and other lands belonging to him in accordance with the act of the territorial legislature of Michigan approved April 12, 1827. In and by said plat he dedicated to the public a described square, space, or tract of land 420 feet in length by 150 feet in width, with the express proviso and condition duly written into and part of said plat certificate and dedication that said space or square or tract

was to be left vacant as public ground and no building was ever to be erected thereon by any body corporate or politic, except that in case of the town becoming incorporated the town authorities might erect a market house on such space. This dedication was duly accepted by "the public authorities."

The *Milwaukee Auditorium Company* has taken steps under ch. 426, Laws of 1905, to join with the city of *Milwaukee* in the erection and maintenance of an auditorium or music hall, each to pay half the money necessary for that purpose. The city raises its share by sale of its bonds which it has issued for this purpose to the amount of $250,000, and the *Auditorium Company* its share from the proceeds of subscriptions to its shares of capital stock. Plans and specifications have been prepared for a building 400 feet in length by 300 feet in width and 150 feet in height, with one or more auditoriums, offices, classrooms, studios, music halls, music rooms, gymnasiums, lodge rooms, and accommodations for industrial, commercial, scientific, educational, fraternal, and musical organizations, and labor associations desiring to use the same for kindred purposes, and defendants intend to operate and manage the building in the manner specified in ch. 426, *supra*. The defendants give out and threaten to, and are about to, proceed with the erection of this building on the public square or space above mentioned and upon a strip of land adjoining this on the west owned by the city. The building so proposed to be erected will completely cover the dedicated square or space, its erection and maintenance amount to an appropriation of the public square to private gain and the diversion thereof to a purpose foreign to that for which the land was dedicated by the plaintiffs' said ancestor. Prayer that the defendants be enjoined from erecting this building on the public square and for general relief.

The defendants answered jointly, denying that the use

proposed was foreign to the purposes for which the land was dedicated, and averring, further, that from 1867 to 1881 this space in question was let or leased as a site for market buildings. The latter buildings were demolished in 1881, and the whole square covered by a building used for the purposes of an industrial exposition owned by a private corporation which held from the city of *Milwaukee* a lease of the ground, and this use continued until June, 1905, when the exposition building was destroyed by fire and not rebuilt. This lease to the exposition company was authorized by ch. 461, Laws of 1885. A claim of adverse possession is set up and a denial that the plaintiffs are wronged or injured or damaged by the acts in question.

The cause was tried and the court made findings supporting the averments of the complaint, except as to the right of the plaintiffs to maintain the action, and further to the effect that the square or space in question remained wholly vacant and unoccupied from its dedication down to 1867 or 1868, during which time it was commonly known as "the Second Ward Park." From that time for about three years it was leased by the city to be built upon and used as a skating rink and was so built upon and used for three years, but the lease from the city covering the period last mentioned provided that the skating rink should be placed far enough back from the street to admit of the erection of stalls and booths for market gardeners. However, no such stalls or booths were erected or used during these three years. Thereafter and up to 1876 the space was used for a public market under a ground lease from the city to the owner of the building thereon and leases of booths and stalls from the lessee to the market men or dealers. In 1876 the city leased the space in question to a corporation called the West Side Market Association for the term of five years and five months at a nominal rental, and this corporation used the premises for market purposes as well as for theatrical and other amuse-

ments until 1880. At this date a corporation called the Milwaukee Industrial Exposition was organized for the purpose of constructing an industrial exposition building and operating the same. To this corporation the city of *Milwaukee* on October 12, 1880, leased the space in question with the adjoining land owned by the city for the term of fifty years at an annual rental of $1, said premises to be used only for the purposes of an industrial exposition in the city of *Milwaukee* as contemplated in the articles of association of the lessee, and for such other purposes of a public nature as the directors of said exposition company should approve. This lease further provided that the lessee should erect a building on said premises to cost not less than $150,000, and, in case of the destruction of this building by fire, if the same was not rebuilt within two years the lease should cease and determine.

Ch. 461, Laws of 1885, expressly authorized the city of *Milwaukee* to lease this square or space for the purpose of maintaining a building thereon to be used for annual industrial expositions and for a public museum, and ratified and confirmed the lease already made. This exposition company went into possession under said lease, erected the required building, and used it from 1881 to 1905 for the purpose of holding annual expositions of machinery, merchandise, and other industrial products, and in the intervals between such annual expositions for holding conventions, athletic exhibitions, concerts, political meetings, a skating rink, and for various amusements, and the city used part of the building for a public museum and also for an art gallery for some part of this time. There were no stalls or booths in this building, and no part of the premises in question was used for market purposes since 1880. June 4, 1905, the exposition building was totally destroyed by fire and the lessee did not rebuild. The project of building a public hall of large capacity was under discussion in *Milwaukee* in 1904, and a certain *quasi-*

public association procured an option from the plaintiffs to build on the space in question in consideration of the payment to plaintiffs of $15,000. Nothing further was done under this option. In 1906 the *Milwaukee Auditorium Company* was organized as a corporation for the purpose of carrying out the powers given by ch. 426, Laws of 1905, its capital stock fixed at 25,000 shares of $10 each, and its shares were subscribed for by 2,700 citizens of *Milwaukee,* upon which subscriptions $208,000 had been paid in. The common council of *Milwaukee,* upon vote of the electors of the city, issued the corporate bonds of the city as stated in the complaint and raised money. The defendants proceeded with the construction of the building, and had up to the time of trial expended $223,000 for that purpose. The building so in course of construction will cost about $500,000, and is mainly a public hall or auditorium capable of accommodating from 7,500 to 10,000 persons. The easterly part of this building, which rests upon the dedicated space in question, consists of an entrance to the auditorium sixty feet in width, also offices, corridors, toilet, and other rooms, and contains in the basement a large room 170 feet long and 60 feet wide, called "Market Hall." North of this is a storage room 112 feet long and 73 feet wide; on the south end, rooms designated kitchens. On the first floor there is what is termed a banquet hall, 88 feet long and 60 feet wide; north of this on the same floor a music hall 92 feet long and 60 feet wide, capable of seating from 1,000 to 1,500 people; and on the second floor of this part of the building are rooms for the administrative officers of the board in charge and for other purposes. The city leased all this land to its codefendant for ninety-nine years, but afterward and by mutual consent of the parties thereto canceled this lease, and the indication of part of the basement space as "Market Hall" was apparently an afterthought, suggested by the exigencies of this litigation. There is no present necessity or demand for a public

market place in *Milwaukee,* but there is such necessity and demand for a public hall of large seating capacity and for a building devoted to the purposes for which this auditorium building is adapted, and its erection will prove a public benefit to the city and promote the welfare and public interests of the citizens.

It is then found that the city of *Milwaukee* and its lessee has openly and notoriously, under claim of right, devoted the space or square in question to purposes foreign to the purposes of a market house and public square since the year 1868, and has used said premises for public purposes of various kinds since said date, and has leased the same and collected rent therefrom, and has used said premises for public purposes other than those named in the certificate of dedication as more particularly described in the previous findings since the year 1880, and such use has been continuous, uninterrupted, adverse, notorious, and under claim of right.

It is said by the appellants the two younger of the plaintiffs reached the age of twenty-one years on February 20, 1888. Byron H. Kilbourn, however, lived until 1897, and the legal title to the remainder of the property was vested in the trustee, Lapham. The trial court from these facts derived the following conclusions of law: (1) That the plaintiffs are not entitled to maintain this action. (2) That the legislature had the power to and did authorize the diversion of the use of the premises in question from the purposes for which they were originally dedicated to those for which they are intended by the defendants. (3) That the use to which this square is proposed to be diverted is a public use. (4) That if the plaintiffs had a right to maintain this action such right would have been barred by subd. 4, sec. 4221, Stats. (1898). (5) That the plaintiffs by laches have lost any right of action they may have had. (6) That defendants are entitled to judgment.

We must of course be able to find that the plaintiffs have a cause of action stated in their complaint and existing in their favor either accruing to them directly or as heirs or representatives of Byron Kilbourn, or as lotowners in this plat, or as representatives of a class consisting of the public or the taxpayers, before this disposition of the case by the court below can be reversed. If this question is resolved adversely to the plaintiffs, we are not called upon to determine any other question in the case.

The legislative council of the territory of Michigan on September 6, 1834, laid out, and on August 25, 1835, authorized, the organization of the county of Milwaukee. On October 8, 1835, Byron Kilbourn platted the land in question. On April 20, 1836, the territory of Wisconsin was by act of Congress set off from the territory of Michigan and established as a separate territory, and this included the county of Milwaukee and the lands in question. On October 8, 1835, the following statute relative to platted town sites was in force in the territory of Michigan (act of April 12, 1827):

"Sec. 2. That such maps or plats as are required by this act to be recorded, shall particularly set forth and describe all the public grounds within such town, by its boundaries, courses and extent, and whether it be intended for streets, alleys, commons or other public uses, and all the lots intended for sale, by progressive numbers, and their precise length and width; and the maps made and acknowledged before a justice of the peace, a justice of the county court of the proper county where the town lies, or before a judge of the supreme court, and certified under the hand and seal of the judge or justice taking such acknowledgment, and recorded, shall be deemed a sufficient conveyance, to vest the fee of such parcels of land as are therein expressed, named or intended to be for public uses, in the county in which such town lies, in trust, to and for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever." Laws of 1827, p. 278.

Beside the streets and alleys, numbered lots and blocks, this plat showed four vacant spaces, and the certificate accompanying the plat stated:

"The four spaces marked 'public' are of the dimensions represented by the lines on the plat and are to be left vacant as public grounds, no buildings ever to be erected on them by any body corporate or politic, except in the case of the town being incorporated the town authorities may erect a market house upon either of those spaces lying in front of blocks Nos. 36, 52, or 76, but no building shall be erected on the space in front of block No. 24."

This suit relates to the space in front of block No. 52.

The record presents rather an anomalous condition. The second finding of the circuit court, not excepted to by appellants, contains the following:

"That such plat was duly made, acknowledged, and recorded by said Byron Kilbourn in accordance with the laws of the territory of Michigan (which territory embraced what is now the state of Wisconsin), to wit, 'An act to provide for the recording of town plats, approved April 12, 1827.' "

At the same time there was received in evidence the decision and opinion of the court and findings of fact in the case of *Williams v. Milwaukee Ind. Expo. Asso.* 79 Wis. 524, 48 N. W. 665, relating to the same plat and title. The case last cited determines that the Kilbourn plat was not duly acknowledged, but became effective as a statutory dedication by virtue of the curative act (ch. 348, Laws of 1883), and that a grantee of Byron Kilbourn had no interest in this public square. Considering the case from the viewpoint that the plat was duly acknowledged and recorded under the laws of Michigan, we have a statute giving the plat the legal effect of a conveyance in fee by the dedicator in trust and not the grant of a mere easement. The conveyance of a fee in trust leaves no present interest in the grantor or his heirs. *Strong v. Doty,* 32 Wis. 381. This effect was given to a statutory dedication under a similar statute in *U. S. v. Ill.*

Cent. R. Co. 154 U. S. 225, 14 Sup. Ct. 1015; *Hunter v. Middleton,* 13 Ill. 50; *Canal Trustees v. Havens,* 11 Ill. 554; *Matthiessen & H. Zinc Co. v. La Salle,* 117 Ill. 411, 2 N. E. 406, 8 N. E. 81; *Board of Ed. v. Edson,* 18 Ohio St. 221; *Young v. Board of Comm'rs,* 51 Fed. 585; *S. C.* 59 Fed. 96; *Union E. Co. v. Kansas City S. B. R. Co.* 135 Mo. 353, 36 S. W. 1071. The conveyance of the fee, whether a fee-simple absolute or a limited fee to the grantee for his use or in trust for others, leaves no present interest in the grantor. Misuser or wrongful diversion of the property does not terminate or forfeit the title of the trustee, nor is it ground for ejectment in the absence of a stipulation in the conveyance forfeiting title for such misuser or diversion. 2 Dill. Mun. Corp. (4th ed.) § 653, and cases; *Williams v. Milwaukee Ind. Expo. Asso.* 79 Wis. 524, 48 N. W. 665; *Parker v. St. Paul,* 47 Minn. 317, 50 N. W. 247; *Goode v. St. Louis,* 113 Mo. 257, 20 S. W. 1048; *Barclay v. Howell's Lessee,* 6 Pet. 498; *Archer v. Salinas,* 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; *Still v. Mayor, etc.* 27 Ga. 502; *Plumer v. Johnston,* 63 Mich. 165, 29 N. W. 687. The remedy for misuser or wrongful diversion by the city is in equity by injunction, and under similar statutes the right to this remedy has been held to be in the city (*Jacksonville v. Jacksonville R. Co.* 67 Ill. 540); in the general property owners in the plat (*Price v. Thompson,* 48 Mo. 361); in the owner of a lot abutting on the public square (*Comm'rs v. Lathrop,* 9 Kan. 453); in citizens, lotowners, and original dedicators in a class action (*Rowzee v. Pierce,* 75 Miss. 846, 23 South. 307); in one of the original dedicators who also was the owner of lots fronting on the public square (*Warren v. Lyons City,* 22 Iowa, 351). We consider this question, however, settled in this state against the right of the appellants to maintain this action as heirs of the dedicator by the cases of *Strong v. Doty,* 32 Wis. 381, and *Williams v. Milwaukee Ind. Expo. Asso.* 79 Wis. 524, 48 N. W. 665, which seem to be in line

with *U. S. v. Ill. Cent. R. Co.* 154 U. S. 225, 14 Sup. Ct. 1015; *Armstrong v. Portsmouth B. Co.* 57 Kan. 62, 45 Pac. 67; and *Lackland v. Walker,* 151 Mo. 210, 52 S. W. 414. Considering that the original dedication was insufficient as a statutory dedication as ruled in *Williams v. Milwaukee Ind. Expo. Asso., supra,* and cases there cited, and only took effect as a statutory dedication upon the enactment of the curative statute (ch. 348, Laws of 1883), the final result is the same. In that view of this case, from October 8, 1835, up to the enactment of the curative statute in 1883 this plat presented the problem of a defective statutory dedication continually tendered to the public and never withdrawn. It is well settled that a defective statutory dedication, if accepted by the public, will be good as a common-law dedication. *Gardiner v. Tisdale,* 2 Wis. 153; 9 Am. & Eng. Ency. of Law (2d ed.) 36, and cases. Open squares in towns are as much within the principles of dedication as highways (*Abbott v. Cottage City,* 143 Mass. 521, 10 N. E. 325), and acceptance thereof may be indicated by common user (Id.). The doctrine of dedication to public uses has always been extended and applied to public squares in cities and villages, these being regarded at common law as easements for the benefit of the public, and the fact of dedication may be established in the same manner as in the case of highways and streets. 2 Dill. Mun. Corp. (4th ed.) § 644, and cases in note; *Bates v. Beloit,* 103 Wis. 90, 78 N. W. 1102; *Lins v. Seefeld,* 126 Wis. 610, 105 N. W. 917. Under this hypothesis, up to the time of the passage of the curative act the fee remained in the dedicator or his successor in interest, subject to an easement in favor of the public, as it always does in case of a common-law dedication. 13 Cyc. 486, and cases. Notwithstanding the more limited common-law dedication to the public had prior to that time taken effect, the enactment of the curative statute in 1883 caused the Kilbourn plat to take effect as a statutory dedication either under the Michigan statute heretofore

quoted, or under sec. 2263, R. S. 1878, which was the statute of this state then in force. *Williams v. Milwaukee Ind. Expo. Asso.* 79 Wis. 524, 48 N. W. 665. This latter statute also gives the plat the legal effect of a conveyance in fee—an effect beyond that of a common-law dedication. The trustee named in these statutes is different, but the title conveyed in trust is not.

By a long line of decisions in this state with reference to streets and roads it has become the settled law of this state that in the case of a road or street, whether acquired by condemnation, conveyance, by common-law dedication or by statutory dedication, the city, town, or village takes only an easement for highway purposes, while the fee is held by the abutting landowner. This brings all roads and streets within an uniform rule; but whether the ruling was originally correct as regards statutory dedication by plat under the statutes quoted is doubtful. However this may be, the rule has been so often applied and is of such long standing that it has become a rule of property with reference to roads and streets and cannot now be departed from. *Gardiner v. Tisdale,* 2 Wis. 153; *Taylor v. C., M. & St. P. R. Co.* 83 Wis. 636, 53 N. W. 853; *Weisbrod v. C. & N. W. R. Co.* 21 Wis. 602; *S. C.* 18 Wis. 35; *S. C.* 20 Wis. 419; *Daniels v. Wilson,* 27 Wis. 492; *Pettibone v. Hamilton,* 40 Wis. 402; *Madison v. Mayers,* 97 Wis. 399, 73 N. W. 43. But with respect to public squares created by statutory dedication, it was held in *Williams v. Smith,* 22 Wis. 594, that the city of Janesville could join with the owners of lots abutting upon a public square in a suit to prevent the diversion of the use of a square from that to which it was originally dedicated. In *Williams v. Milwaukee Ind. Expo. Asso.* 79 Wis. 524, 48 N. W. 665, it was said with reference to the public square here in question that one to whom Byron Kilbourn, after filing his defective plat, granted an undivided interest in all the platted land, but who began a suit after the enactment of

the curative statute, had no interest in the square in question. But in *Milwaukee v. M. & B. R. Co.* 7 Wis. 85, it was held that the city had no such interest in a public square as would enable it to maintain an action to enjoin the railroad company defendant from constructing its railroad in such square.

This condition of the precedents in this state with reference to public squares under a statutory dedication leaves this court free to re-examine and construe that statute so far as the same relates to public squares. Upon the face of these statutes it is very clear that, as soon as the statutory dedication took effect, Byron Kilbourn, or those claiming under him, parted with the title in fee to the municipality. When the municipality took the fee in trust for the public, this conveyance left no residue of title or interest in the dedicator or those claiming under him by virtue of which they could claim any present interest in the dedicated land. So far as the case relates to public squares created by statutory dedication, *Milwaukee v. M. & B. R. Co.* 7 Wis. 85, is overruled. These trusts for the benefit of the public come under the law relative to charitable trusts, so far at least as the enforcement of the trust is concerned. 1 Beach, Trusts & Trustees, § 317, and cases in note; *Armstrong v. Portsmouth B. Co.* 57 Kan. 62, 45 Pac. 67; *Lackland v. Walker,* 151 Mo. 210, 52 S. W. 414. This is a very ancient rule of the common law, and the right of the grantor in such conveyance, if it existed, would be a mere right of action and not an interest in the property. When we consider that such trusts may last for centuries, we get a suggestion of at least one of the reasons for this rule so far as public or charitable trusts are concerned. But the rule itself is firmly established. If the plaintiffs have no interest differing from that of any other member of the public in preventing the misuser of this property, they cannot maintain an action in their own right as heirs of the dedicator. We are convinced that the plaintiffs have no present interest in this public square, special or pe-

culiar to them, and differing in nature from the interest of other members of the public. It remains to be seen whether the present action can be sustained as a class action or a taxpayers' suit. We do not intend to affirm or deny, in this opinion, the right of the taxpayers or lotowners as a class to restrain this use of the property in question in a suit brought by one or more in behalf of himself and all others similarly situated. We hold that the complaint in this action does not present such a case.

The general rule requires an express averment in the complaint to the effect that the action is brought in behalf of the plaintiffs and others similarly situate with respect to the subject matter of the action. *Cawker v. Milwaukee,* 133 Wis. 35, 113 N. W. 417. This averment may in some cases be omitted, "providing the complaint clearly shows upon its face that the right sought to be vindicated is a public right and the primary relief demanded is relief to which the whole body of taxpayers *only* are entitled." This the complaint fails to do. It carefully sets forth the ownership of the land in question and its platting by the ancestor of plaintiffs, and then traces plaintiffs' title from said ancestor. It sets forth that the plaintiffs own two lots in this plat, which lots are described, and avers that these lots are but a short distance from the square in question, and then the threat and intention to erect and maintain the auditorium building. This is followed by an averment that this erection and maintenance "amount to an appropriation of said land to private gain and to a purpose entirely foreign to that for which said land was so dedicated to the public by plaintiffs' ancestor as aforesaid." The relief asked is that the defendants be enjoined from erecting or constructing on said land so dedicated to the public the said building or any building except a market house in accordance with the terms and conditions of such dedication. This is followed by a prayer for general relief.

From this synopsis of the complaint it must be obvious

that the main purpose of the pleader was to proceed in behalf of the plaintiffs as heirs of Byron Kilbourn having an interest in the dedicated land. This is an action which might be maintained by the dedicator or his heirs under a common-law dedication and in other cases where they retained an interest in the land. *Gardiner v. Tisdale,* 2 Wis. 153; *Weisbrod v. C. & N. W. R. Co.* 21 Wis. 602; *Freedom v. Norris,* 128 Ind. 377, 27 N. E. 869. Merely by virtue of owning two lots in this plat not abutting on the square in question the plaintiffs showed no special or peculiar interest in restraining the alleged public wrong. *Zettel v. West Bend,* 79 Wis. 316, 48 N. W. 379; *Liermann v. Milwaukee,* 132 Wis. 628, 113 N. W. 65. The plaintiffs have shown no right of action in themselves to restrain the alleged misuser, and, the action not having been brought in behalf of a class who might possess that right, it follows that the judgment of the circuit court must be affirmed. We do not reach or pass upon any other matter found by the circuit court.

By the Court.—Judgment affirmed.

SIEBECKER, J., dissents as to the construction of the complaint.

MCDERMOTT, Plaintiff in error, vs. THE STATE, Defendant in error.

GRADY, Plaintiff in error, vs. THE STATE, Defendant in error.

March 21—May 24, 1910.

Constitutional law: Pure food laws: State legislation: Validity: Interstate commerce: Police power of state: Protection against fraud: Labeling syrups: Glucose mixtures: "Corn syrup."

1. Laws regulating the labeling and sale of food products within the state, so far as they affect interstate commerce, are within the field of concurrent jurisdiction of the state and federal governments, wherein the state may enact appropriate regulations if they do not conflict with federal laws.

2. After merchandise transported from one state to another has become mingled with the general property of the latter state by being treated as other property for sale to customers at retail, it is no longer within the channel of interstate commerce, and the fact that it is being sold in the original packages does not prevent the state from subjecting it to appropriate police regulations.
3. The act of Congress of June 30, 1906 (Food and Drugs Act), regulates sales beyond the channels of interstate commerce in the District of Columbia and the territories, but does not regulate such sales, *in the states*, of articles transported from one state to another. It therefore does not preclude state legislation such as ch. 557, Laws of 1907, which does not prohibit the sale of the articles specified but seeks to regulate the traffic therein and prevent deception by prescribing how the packages shall be labeled and branded to give information as to their contents.
4. Such legislation to protect the public against imposition and deception, even in the sale of articles of food which are wholesome, may be enacted under the police power, and importers and vendors of such articles are not thereby deprived of liberty or property without due process of law in violation of secs. 1, 8, 9, 13, art. I, Const. of Wisconsin, or Amendm. XIV, Const. of U. S.
5. The first clause in sec. 4601—1*a*, Stats. (Laws of 1907, ch. 557), prohibiting the sale of unmixed syrups, molasses, or glucose unless true to name as defined in the standards of purity "latest promulgated by the United States secretary of agriculture," and that part of said section which regulates the sale of syrups or molasses mixed with glucose, are so distinct and independent of one another that, even if the first clause is invalid because of indefiniteness or because it attempts to delegate legislative power to the secretary of agriculture (a point not determined), such invalidity does not affect the other part of the section.
6. The term "syrup," as used in ch. 557, Laws of 1907, and kindred statutes, designates articles of food which are in common use as table syrups, the products of sugar-producing plants, possessing natural characteristics of flavor, color, and viscidity which make them acceptable as to quality and agreeable in taste, and hence desirable as articles of table food. Glucose in its pure and unmixed state is not such a syrup.
7. The terms "glucose" and "corn syrup" are not synonymous in their trade meaning and use as applied to articles of table food; and the use of the term "corn syrup" as designating glucose or a mixture of glucose and syrup would naturally lead consumers into the belief that they were obtaining syrup of the kind commonly known as syrup, the product of sugar-producing plants, and hence such use of that term may be prohibited.

TIMLIN and MARSHALL, JJ., *dissenting*, are of the opinion, among other things, that fraud or deceit upon the public which will uphold such a statute as ch. 557, Laws of 1907, and justify reasonable restriction of constitutional rights must be *actionable* fraud, resulting in damage as well as deception; that a statute which, like said ch. 557, authorizes, if it does not require, unmixed glucose to be called "corn syrup," but requires it to be called "glucose" when mixed with other designated substances, rather authorizes than prevents deception; that the term "corn syrup" is a lawful and also a popular, familiar, and correctly descriptive designation of the substance otherwise called glucose, and that the use of such designation would not deceive the public; that the purpose of ch. 557, as shown by its title, is "to protect the public health," not to protect against fraud or deception, and that it cannot be upheld on the latter ground; that, glucose being a wholesome substance, in no wise injurious to health, the statute requiring it to be labeled with that unpopular name tends to deprive the citizen of liberty and property in violation of constitutional rights, and also restricts interstate commerce by restraining the sale of an article of commerce after it has reached this state, without any valid reason for such restriction.

ERROR to review judgments of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The defendants were, in separate actions, convicted in the municipal court of Dane county of violating ch. 557, Laws of 1907. Upon appeal to the circuit court for Dane county each of the defendants waived a jury and entered into a stipulation with the state whereby the two actions were to be tried together and the testimony taken was to be regarded as the testimony in each case. The actions are before this court on writs of error to the circuit court for a review of the proceedings wherein they were convicted and sentenced.

Ch. 557, Laws of 1907, so far as essential to the consideration of these actions, provides as follows:

"No person . . . shall sell, offer or expose for sale or have in his possession with intent to sell any syrup," etc., "unless the same be true to the name under which it is sold and as defined in the standards of purity for food products as latest promulgated by the United States secretary of agriculture;

. . . and no person . . . shall sell, offer or expose for sale or have in his possession with intent to sell any syrup," etc., . . . "or molasses, mixed with glucose, unless the barrel, cask, keg, can, pail or other original container, containing the same be distinctly branded or labeled so as to plainly show the true name of each and all of the ingredients composing such mixture, as follows:

"First. In case said mixture shall contain glucose in a proportion not to exceed 50 per cent. by weight, it shall be labeled and sold as 'Maple Syrup and Glucose,' " etc.

"Second. In case said mixture shall contain glucose in a proportion exceeding 50 per cent. and not more than 75 per cent. by weight, it shall be labeled and sold as 'Glucose and Maple Syrup,' " etc.

"Third. In case said mixture shall contain glucose in a proportion exceeding 75 per cent. by weight, it shall be labeled and sold as 'Glucose Flavored with Maple Syrup,' " etc.

The complaint in one case charges the defendant with having had for sale and selling a certain mixture composed of more than 75 per cent. glucose and less than 25 per cent. cane syrup, and that the can containing the mixture was labeled "Karo Corn Syrup;" "10 per cent. Cane Syrup, 90 per cent. Corn Syrup." In the case of the other defendant it is charged that the can was labeled "Karo Corn Syrup with Cane Flavor;" "Corn Syrup 85 per cent."

The defendants are retail merchants at Oregon, Dane county. The goods were bought by each of them from wholesalers in Chicago, a number of cans being packed together in a box. When received by the defendants the goods were removed from the boxes and placed upon the shelves in the stores for sale in their retail trade. The wooden boxes in which the goods were received have been destroyed. The sale of the articles is admitted.

Glucose is a viscid product made by treating starch with mineral acids. The acid is then neutralized, the product made colorless, and the water in it largely evaporated. Glucose is of a slightly sweet, insipid taste, and in order to make

it a palatable and salable article of food it is mixed with and flavored by cane, maple, refiners', or sorghum syrup. In Europe the starch used for producing glucose is almost exclusively obtained from potatoes; in the United States from corn. There was evidence that in the United States there exists a prejudice against glucose as an article of food and that dealers and manufacturers label and sell it as "Corn Syrup."

H. O. Fairchild, for the plaintiff in error, contended, *inter alia,* that ch. 557, Laws of 1907, is invalid, because in violation of the commerce clause of the federal constitution, being an attempted regulation of interstate commerce in an article of food after Congress had fully covered the same subject by specific regulations. The state statute forbids the sale of any article named in the statute unless the original container thereof be branded or labeled as specified in the statute, whether the article is or is not at the time a subject of interstate commerce, or the container is or is not the original package of such commerce. The act must be valid as to such articles of interstate or foreign commerce when held for sale or offered for sale or sold in unbroken original packages by the importer, or is altogether invalid. *U. S. v. Ju Toy,* 198 U. S. 253, 262, 263; *Employers' Liability Cases,* 207 U. S. 463, 497, 498, 509; *Ill. Cent. R. Co. v. McKendree,* 203 U. S. 514, 529, 530; *Trade-mark Cases,* 100 U. S. 82; *State v. Mo. Pac. R. Co.* 212 Mo. 658, 111 S. W. 500; *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 417; *Gilbert-Arnold L. Co. v. Superior,* 91 Wis. 353, 357; *Huber v. Martin,* 127 Wis. 412, 445; *Connolly v. Union S. P. Co.* 184 U. S. 540. But the act is void as to interstate shipments held for sale by the importer in the original unbroken package. *Greek-Am. S. Co. v. Richardson D. Co.* 124 Wis. 469, 475; *Brown v. Maryland,* 12 Wheat. 419; *Schollenberger v. Pennsylvania,* 171 U. S. 1, 24. The federal food and drugs act is supreme and exclusive. *Morgan's S. Co. v. Louisiana Bd.*

of Health, 118 U. S. 455; *Covington & C. B. Co. v. Kentucky,* 154 U. S. 204, 212; *Gulf, C. & S. F. R. Co. v. Hefley,* 158 U. S. 98, 104, 105; *Interstate Comm. Comm. v. D., G. H. & M. R. Co.* 167 U. S. 633, 642; *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 414. At the time ch. 557 was enacted Congress had already completely occupied the legislative field as to the branding and labeling of interstate shipments of food products, including those named in sec. 4601—1*a*, Stats., and the state could not lawfully cover any part of the same field so fully covered by the federal statute. Congress having assumed jurisdiction by its act over the entire subject, its regulations must be deemed to be full and complete and only such as it considers wise or proper to make. *Robbins v. Shelby Co. Tax. Dist.* 120 U. S. 489, 493; *Leisy v. Hardin,* 135 U. S. 100; *In re Rahrer,* 140 U. S. 545, 555, 556; *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 414. But the provisions of the state statute are in direct conflict with the federal act and are therefore inoperative. There was therefore no law of the state violated by either of the defendants in making the sale of "Karo Corn Syrup with Cane Flavor," as charged in the complaints and warrants. In this view of the case it makes no difference whether, at the time of the sales by the defendants, the particular cans of syrup sold by them had or had not ceased to be articles of interstate commerce, because of the original package having been broken, if that be the case. Taking small packages from the large container does not withdraw them from the operation of the federal act. *U. S. v. Green,* 137 Fed. 179, 189; *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 414. The state statute is invalid, also, because one of its chief provisions—without which the statute would not have been passed—is too uncertain and shifting to serve as a penal statute, and is also an attempted delegation of legislative power to the secretary of agriculture of the United States. No criminal statute can lawfully be thus changing according to

the whim or changing judgment of any individual. *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 160; *Goodrich v. State,* 133 Wis. 242, 245; *Miller v. C. & N. W. R. Co.* 133 Wis. 183, 190, 191; *State v. Holland,* 37 Mont. 393, 96 Pac. 719, 722. The citizen cannot be driven to private sources to ascertain the laws under which he is living and must carry on his business, and the records of the Department of Agriculture at Washington are private sources. *State v. Holland,* 37 Mont. 393, 96 Pac. 719; *Brown v. State,* 137 Wis. 543, 548; *People v. Briggs,* 193 N. Y. 457; *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 160. If the secretary of agriculture may change standards at will and the names therein defined, and the seller be required to comply with such changing and changed standards, then the lawmaking power is delegated to the secretary of agriculture. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63; *In re North Milwaukee,* 93 Wis. 616; *State ex rel. Boycott v. La Crosse,* 107 Wis. 654, 659; *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182; *State v. Holland,* 37 Mont. 393, 96 Pac. 719, 722; *O'Neill v. American F. Ins. Co.* 166 Pa. St. 72, 26 L. R. A. 715. Ch. 557 deprives the defendants of their liberty and property without due process of law, and is in violation of secs. 1, 8, 9, and 13 of art. I, Wisconsin constitution, and the XIVth amendment of the constitution of the United States. The defendants had the right to sell the articles in question, branded as they were branded—they being concededly wholesome,—unless the public safety would be injured or threatened thereby, and to deprive them of such right and to penalize them for exercising it was not only to deprive them of their property but of their liberty without due process of law. *People v. Hawkins,* 157 N. Y. 1, 8; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 533, 534; *Allgeyer v. Louisiana,* 165 U. S. 578; *State v. Redmon,* 134 Wis. 89; *Bonnett v. Vallier,* 136 Wis. 193; *Dobbins v. Los Angeles,* 195 U. S. 223. Requiring the article to be sold as glucose is a fraud on the public as well as

the manufacturer and dealer. Prescribing such an obnoxious branding is unreasonable and therefore invalid. Freund, Police Power, §§ 50, 51; *People v. Hawkins,* 157 N. Y. 1, 8; *Collins v. New Hampshire,* 171 U. S. 30; *Crossman v. Lurman,* 171 N. Y. 329; *Crossman v. Lurman,* 192 U. S. 189, 195, 199, 200; *People v. Harris,* 135 Mich. 136.

For the defendant in error there were briefs signed by *Olin & Butler,* of counsel, and oral argument by *J. M. Olin.* They argued, among other things, that ch. 557, Laws of 1907, is not invalid because in violation of the commerce clause of the federal constitution or of the federal food and drugs act of 1906. All the authorities agree that (at least in the absence of Congressional action otherwise indicating) an article ceases to be the subject of interstate commerce and becomes subject to the police power of the state, when the original package in which it is usually and in good faith shipped has been received and broken by the importer, or when he has made the first sale thereof in the original package so received. *Cook v. Marshall Co.* 196 U. S. 261; *Austin v. Tennessee,* 179 U. S. 343; *May v. New Orleans,* 178 U. S. 496; *Greek-Am. S. Co. v. Richardson D. Co.* 124 Wis. 469. The mere fact that Congress, in the exercise of its power to regulate commerce, has legislated upon the general subject of the transportation and sale of an article of interstate commerce, does not, in itself, take away the right of the state, in the exercise of its police power, to make regulations concerning the same article as a subject of intrastate commerce, at least so long as such state regulations do not conflict with the federal regulation. *Reid v. Colorado,* 187 U. S. 137; *Asbell v. Kansas,* 209 U. S. 251; *Crossman v. Lurman,* 192 U. S. 189; *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 416, 417; *Mo., K. & T. R. Co. v. Haber,* 169 U. S. 613, 624; *Gulf, C. & S. F. R. Co. v. Hefley,* 158 U. S. 98, 104; *W. U. Tel. Co. v. James,* 162 U. S. 650, 654; *Savage v. Scovell,* 171 Fed. 566. The federal act of 1906 does not

expressly or impliedly operate upon the original package of commerce after it has been broken, or after its first sale as such by the importer, but, on the contrary, the act clearly shows the Congressional intention to leave the article subject to state regulation after it has so ceased to be the subject of interstate commerce; and therefore there is no conflict between the federal act and the state law. A construction of the act of 1906 which would make it operate upon the contents of the original package of shipment, or upon such original package after its first sale by the importer, would render the act, thus far at least, invalid, as an unconstitutional invasion by Congress of the power reserved to the states to regulate their own internal affairs. The regulation of the internal affairs of a state by Congress is as unconstitutional as is the direct attempt by a state to regulate interstate commerce. *Ill. Cent. R. Co. v. McKendree,* 203 U. S. 514; *Geer v. Connecticut,* 161 U. S. 519, 531; *Covington & C. B. Co. v. Kentucky,* 154 U. S. 204, 210; *Sands v. Manistee R. I. Co.* 123 U. S. 288, 295; *U. S. v. Dewitt,* 9 Wall. 41; *Gibbons v. Ogden,* 9 Wheat. 1, 186; *License Cases,* 5 How. 504, 574. A statute whose terms are broad enough to include both intrastate and interstate commerce will be construed as applicable only to intrastate commerce when it would be unconstitutional if applied to interstate commerce. *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 650; *Church of the Holy Trinity v. U. S.* 143 U. S. 457, 459; *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 473; 17 Am. & Eng. Ency. of Law (2d ed.) 75; *State v. Smiley,* 65 Kan. 240, 67 L. R. A. 903, 907; *Supervisors v. Stanley,* 105 U. S. 305; *Waters-Pierce O. Co. v. Texas,* 177 U. S. 28, 42; *Opinion of Justices,* 41 N. H. 553, and other cases. Whether the act in question applies to interstate commerce or not is not of much importance under the conceded facts of this case, since the defendants are in no position to raise that question, because the transactions involved were wholly of an intrastate char

acter. It is only persons engaged in interstate commerce who can raise the constitutional question that a state statute violates the commerce clause of the United States constitution. *State v. Smiley,* 65 Kan. 240, 67 L. R. A. 903, 907; *State v. Sbragia,* 138 Wis. 579, 582; *State ex rel. Bergh v. Sparling,* 129 Wis. 164, 171; *Strange v. Oconto L. Co.* 136 Wis. 516, 524, 525; *Appleton W. W. Co. v. Appleton,* 116 Wis. 363, 373, and other cases. The provision of the statute that the article sold must be according to the standards as latest promulgated by the United States secretary of agriculture, and making it a misdemeanor to sell an article below such standard, is constitutional. The standards latest promulgated were in existence at the time ch. 557 of the Laws of 1907 was enacted. Hence, the application of the law in the present cases does not depend, as in many of the cases cited below, upon the determination by any board or officer of some fact or event in the future. The statute under consideration is not only complete in itself, but prior to its enactment the action of the outside board or officer designated had already taken place. Hence the law is to be construed the same as though the standards which had theretofore been determined by the committee on food standards and approved by the secretary of agriculture had been written out in the statute. Such a law is a valid enactment under all of the decisions. *Field v. Clark,* 143 U. S. 649; *In re Kollock,* 165 U. S. 526; *Caha v. U. S.* 152 U. S. 211; *Buttfield v. Stranahan,* 192 U. S. 470, 494; *Union B. Co. v. U. S.* 204 U. S. 364; *St. Louis, I. M. & S. R. Co. v. Taylor,* 210 U. S. 281, 286, 287; *Dastervignes v. U. S.* 122 Fed. 30; *Dent v. U. S.* 8 Ariz. 413, 76 Pac. 455; *Coopersville C. C. Co. v. Lemon,* 163 Fed. 145; *People v. Jennings,* 132 Mich. 662, 94 N. W. 216; *State v. Williams,* 93 Minn. 155, 100 N. W. 641; *State Board v. Gasau,* 107 N. Y. Supp. 409; *State Board v. Gasau,* 102 N. Y. Supp. 539; *State v. Emery,* 55 Ohio St. 364, 45 N. E. 319; *State v. Hutchinson,* 56

Ohio St. 82, 46 N. E. 71; *State ex rel. Port Royal M. Co. v. Hagood,* 30 S. C. 519, 9 S. E. 686; *Leeper v. State,* 103 Tenn. 500, 53 S. W. 962, 966; *Ex parte McManus,* 151 Cal. 331, 90 Pac. 702. It is immaterial that the standards in question were fixed by a body or authority outside the state of Wisconsin over which the legislature of the state has no authority. *U. S. v. Bailey,* 9 Pet. 238; *People v. Fire Asso.* 92 N. Y. 311; *Phœnix Ins. Co. v. Welch,* 29 Kan. 672; *State v. Williams,* 93 Minn. 155, 100 N. W. 641; *State Board v. Gasau,* 107 N. Y. Supp. 409; *State v. Emery,* 55 Ohio St. 364, 45 N. E. 319; *People v. Jennings,* 132 Mich. 662, 94 N. W. 216; *In re Griner,* 16 Wis. 423, 435; *In re Oliver,* 17 Wis. 681, 682, 686; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 162; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 515.

SIEBECKER, J. The defendants in these two actions admit that in the conduct of their retail trade at their respective places of business they sold the article as a table syrup, as charged in the complaint. It is also admitted that the purchaser received from each defendant a can of goods of what is called "Karo," "Corn Syrup with (Cane) Flavor," which is a mixture of glucose and refiners' syrup.

Ch. 557, Laws of 1907, provides that no person shall sell, offer or expose for sale, or have in his possession with intent to sell, any of the syrups specified in the act or any molasses or glucose, unless the same be true to the name under which it is sold and as defined in the standards of purity for food products as latest promulgated by the United States secretary of agriculture, and unless the barrel, cask, keg, can, pail, or other original container containing the same be distinctly branded or labeled with the true name of its contents, as defined in the above-named standards; and no person shall sell, offer or expose for sale, or have in his possession with intent

to sell, any syrup or molasses mixed with glucose, unless the barrel, cask, keg, can, pail, or other original container containing the same be distinctly branded or labeled so as to plainly show the true name of each and all of the ingredients composing such mixture. The law then prescribes how syrup and glucose mixtures shall be labeled and branded, and separates the same into three classes: First. If the proportion of glucose does not exceed 50 per cent. by weight, it shall be labeled and sold by prefixing the name of syrup used as "Maple Syrup and Glucose." Second. If such proportion of glucose exceeds 50 per cent. and not more than 75 per cent., it shall be labeled and sold by adding the name of syrup as "Glucose and Maple Syrup." Third. If the proportion of glucose exceeds 75 per cent., it shall be labeled and sold by adding the name of syrup used for flavoring as "Glucose Flavored with Maple Syrup." It also prescribes the type and color of the label and that the ingredients used must be free from substances injurious to health or prohibited for use as articles of food. Any person violating the provisions of the act is deemed guilty of a misdemeanor and subject to fine and imprisonment.

The defendants assail the validity of this legislation upon several grounds. It is asserted that the act is invalid because the provisions are violative of the commerce clause of the federal constitution, in that it attempts to regulate interstate commerce in an article of food, and that Congress has heretofore exercised its power by enacting specific regulations on the subject. The legislation, so far as it may be said to affect interstate commerce, falls within what has been termed the field of "concurrent jurisdiction" of the state and federal governments, and wherein the state may enact appropriate regulations provided they do not conflict with Congressional legislation on the subject. *Brown v. Houston,* 114 U. S. 622, 5 Sup. Ct. 1091; *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 117 N. W. 686.

The contention, however, is earnestly pressed upon us that the provisions of this state statute which have been applied to these defendants are in conflict with the rights secured under the federal constitution granting the federal government authority to regulate interstate commerce. To support this claim it is asserted that defendants' sales of the article in the cans as imported by them were sales in unbroken original packages; that to make such sales is a right secured to them as importers; and that the state regulations impose restrictions on them as importers and thus violate their rights secured to them by the federal constitution. In *Greek-Am. S. Co. v. Richardson D. Co.* 124 Wis. 469, 102 N. W. 888, the right of an importer to sell the articles imported into a state was considered, and the original case of *Brown v. Maryland,* 12 Wheat. 419, was relied on to the proposition that "sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part." This right of sale is therefore under the federal authority assured to the importer because it is an act which, if inhibited, would in effect be a prohibition of the importation. In *Schollenberger v. Pennsylvania,* 171 U. S. 1, 13, 18 Sup. Ct. 762, the court, speaking on this subject, says:

"Reasonable and appropriate laws for the inspection of articles including food products were admitted to be valid, but absolute prohibition of an unadulterated, healthy, and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure."

The provisions of this statute in no way prohibit the sale of the articles embraced within the regulation. Its object is to so regulate the traffic therein as to protect the people against imposition and false pretenses. The context of the law evinces the purpose that the regulations should apply to the traffic in the designated articles of food from the time they become at rest and mingled with the property of the

state. That goods and merchandise transported from one state to another may thus become commingled with property of the state upon arrival at its destination by treating it as other property for sale to customers in a retail business was recognized in *Brown v. Houston,* 114 U. S. 622, 5 Sup. Ct. 1091. Under such circumstances, the fact that the articles are being sold in the original packages as transported cannot operate to prevent the state from subjecting them to proper police regulation for the protection of the people. Under such conditions the articles are no longer in the channels of interstate commerce at the point of destination and before sale. Their status at this point is like that of other property held by dealers for sale to consumers in the retail trade. As was stated by Chief Justice MARSHALL in *Brown v. Maryland,* 12 Wheat. 419, the original case concerning sales by importers:

"It is sufficient for the present to say generally that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with more of the property of the country, it has perhaps lost its distinctive character as an import. . . ."

Applying this principle for distinguishing between articles that are within and without the channel of interstate commerce to the facts of the instant case, it seems clear that, when the defendants received the articles at their places of business, removed the cans from the container in which they were shipped, and put the goods up for sale in the cans as they received them, they had so dealt with the articles as to mingle them with the general property of the state before they were sold by them in their retail trade. *May v. New Orleans,* 178 U. S. 496, 20 Sup. Ct. 976; *Plumley v. Massachusetts,* 155 U. S. 461, 15 Sup. Ct. 154; *Austin v. Tennessee,* 179 U. S. 343, 21 Sup. Ct. 132.

It is, however, argued that these articles were in the channels of interstate commerce at the time of the sale because

Congress, under the food and drugs act of June 30, 1906 (ch. 3915, 34 U. S. Stats. at Large, 768, U. S. Comp. Stats. Supp. 1909, p. 1187), regulated the traffic therein, and that such regulation extends to and covers the regulation provided by the state law. The contention is that the federal act by specific regulation provides for the branding and labeling of articles of food, and that this regulation covers and embraces the acts of sale for which the defendants are being prosecuted and punished under this state law. The title of this federal act declares its purpose is to prevent "the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods," and for regulating traffic therein. By sec. 1 of the act it is made unlawful for any person to manufacture food in any territory and the District of Columbia which is adulterated or misbranded. Sec. 2 provides:

"That the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any state or territory or the District of Columbia to any other state or territory or the District of Columbia, or to a foreign country, or who shall receive in any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor," etc.

In so far as this act regulates interstate commerce in articles of food it is a prohibition of the introduction of adul-

terated and misbranded articles of food from one state into another, and provides a punishment if any person shall ship or deliver for shipment such an article from one state to another, or who shall deliver it in the original unbroken packages for pay or otherwise, or offer to deliver it to any person, or any person selling it or offering it for sale in the District of Columbia or the territories of the United States. The first paragraph of this section forbids any person shipping and delivering for shipment the prohibited article from one state to another and receiving such an article into a state, and, after having so received it, delivering it in the original unbroken packages for pay or otherwise or offering to so deliver it. It will be observed that this part of the act does attempt to regulate the traffic in these articles in the course of their importation from one state into another without reference to a sale thereof after arrival at their destination. But in the next clause the sale thereof is also regulated in the District of Columbia and territories of the United States. The terms of the act plainly indicate that Congress extended its regulation expressly to the acts of sales in the District of Columbia and the territories, and the provisions of that regulation did not extend to the act of sale of an importation from one state to another. It is evident from these provisions of the act that Congress intended to extend its regulation of this traffic in the District of Columbia and the territories beyond the traffic within the channels of interstate commerce, obviously for the reason that the legislative function to prescribe all police regulations within these jurisdictions devolves on it, while in the several states of the Union this function devolves on the legislatures. *Sherlock v. Alling,* 93 U. S. 99; *Smith v. Alabama,* 124 U. S. 465, 8 Sup. Ct. 564; *Dent v. West Virginia,* 129 U. S. 114, 9 Sup. Ct. 231; *In re Rahrer,* 140 U. S. 545, 11 Sup. Ct. 865.

It will be observed that the statute of this state does not prohibit the sale or traffic in the article sold by the defend-

ants, but seeks to regulate the traffic therein to the extent of prescribing how the packages shall be labeled and branded to afford persons information as to the kinds and proportions of the ingredients composing the mixture. Its evident purpose is to prevent deception and to promote fair dealing in the sale of an article of food. If the regulation provided by the state tends to correct an actual evil in the traffic by which purchasers of an article of food are being deceived into buying something which it in fact is not, then the state acted within its appropriate field under the police power, and the law cannot be said to be invalid for want of power in the state to deal with the subject. The right of the state to legislate on this subject under such circumstances is well recognized and established.

The law is also assailed on the ground of indefiniteness in its provisions, and that it attempts to delegate legislative power to the secretary of agriculture of the United States. These alleged objectionable features are embodied in the first clause of sec. 4601—1*a*, Stats. (Laws of 1907, ch. 557), which prohibits selling, offering, or exposing for sale, or having possession with intent of selling, any unmixed syrup, molasses, or glucose "unless the same be true to the name under which it is sold and as defined in the standards of purity for food products latest promulgated by the United States secretary of agriculture," and requires the packages or containers to be branded or labeled accordingly. The section in a separate and independent clause next provides that no person shall sell any such syrup or molasses mixed with glucose, unless the original containers be branded or labeled as therein provided. The lower court held that the first part of the act relating to the mixtures of syrups, molasses, and glucose is a separate and independent clause, and wholly distinct from the clause preceding it, which deals with articles in their unmixed state as defined in the prescribed standard of purity. We are of the opinion that this ruling is correct. The pro-

vision pertaining to the mixed articles is as distinct from those in the preceding clause as if separated into independent sections; nor are the provisions of the former essential to give the latter meaning or completion. The two parts deal with distinct topics in an independent manner. Under these conditions we think that these two parts of the act were so treated by the legislature and that the one may be made operative and enforced without the other. The legislature might well have considered that the simple unmixed articles for which standards were prescribed were much less liable to have been made the subject of imposition on the public than the mixed articles involved in the second clause, and thereby were induced to legislate as to the latter regardless of the considerations involved in prescribing regulations for the former. Under such conditions there is no apparent ground for holding that the adoption of the one part of the act was conditioned upon the adoption of the other. This renders unnecessary consideration of the validity of the first part which is assailed by the defendants, and we do not pass on the question. *Loeb v. Columbia Tp. Trustees,* 179 U. S. 472, 21 Sup. Ct. 174; *Quiggle v. Herman,* 131 Wis. 379, 111 N. W. 479; *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, 123 N. W. 248.

The defendants assert that they are deprived of their liberty and property under the provisions of this state statute without due process of law, in that the act violates secs. 1, 8, 9, and 13 of art. I of the state constitution and the XIVth amendment of the constitution of the United States. The propositions involved in this claim of the defendants, as we comprehend them, are that as a matter of fact the article sold is a wholesome article of food for table use; that it is in fact a syrup as this term is commonly used and understood; that the terms "glucose" and "corn syrup" are synonymous and are in commerce interchangeably applied to the product obtained from the starch-containing part of corn; that the article

sold is known to consumers as "corn syrup" and is by them understood to be a compound of the product obtained from the starch of corn, mixed and flavored with table syrup. The record sustains the contention that commercial glucose is extensively used as an ingredient in articles of food, and in its pure state is a nutritious and wholesome product. The claim that it is in fact a syrup, as this term is commonly used and understood, is not sustained. The term "syrup" has an accepted meaning as commonly and properly understood and applied to articles of food for table use. It is in this sense that the term must be applied in dealing with this subject, and in this sense the term "syrup" is employed in this and kindred legislation regulating traffic in foods. The term "syrup" thus employed designates articles of food which are in common use as table syrups, such as maple, sugar cane, and refiners' syrup. These articles in their pure and unmixed state are known by their inherent and peculiar colors, flavors, and viscidity which make them acceptable as to quality and impart to them an agreeable taste, and hence they are desirable as articles of table food. The evidence shows that such table syrups are the products of sugar-producing plants and possess these natural characteristics of flavors, colors, and consistency, and that they are commonly distinguished and known in the trade as syrups. It is not disputed but that glucose, whether made from corn or other starch-containing substance, is not such a syrup, and that it has none of the flavors or colors of these table syrups, though it has viscidity. The court was therefore fully justified in finding that glucose in the pure and unmixed state is not a syrup in the sense the term is commonly used and applied to these articles of table foods, and that the terms "glucose" and "corn syrup" are not synonymous in their trade meaning and use as applied to articles of table food. The fact that the term "corn syrup" may have been applied to glucose to some extent by manufacturers and dealers and was thus employed in legislation in

this state and in the decisions of courts does not show that glucose is commonly known by the designation of "corn syrup." The characteristics and qualities of glucose in its pure state are admittedly not those of the articles known in the trade as table syrups; nor is it used as a table syrup in its unmixed state. The term "corn syrup," as applied generally to an article for table use, conveys a meaning and designates an article wholly different in character and quality from that of glucose. It does not appear that "corn syrup" designates a mixture having a fixed proportion of glucose or syrup constituents. It seems that such constituents are of variant proportions in the article sold as "corn syrup." Nor can it be said that the great mass of persons understand that "corn syrup" is a mixture of glucose and syrup. The natural result of such use of the term "corn syrup" is to mislead the consumers into the belief that they are obtaining a table syrup of the variety and kind commonly known as syrup, the product of sugar-producing plants, and the consequences of such practice are that the consumers are misled and deceived in respect to the actual nature, the constituents, and the value of the article as a food product. Such a state and condition of affairs respecting the traffic in an article of food, though the article and its constituents are wholesome, is a well-recognized ground for the exercise of legislative authority under the police power to prescribe regulations to protect the people from imposition and deception in trafficking therein. *Gibbons v. Ogden,* 9 Wheat. 1; *Barbier v. Connolly,* 113 U. S. 27, 5 Sup. Ct. 357; *Powell v. Pennsylvania,* 127 U. S. 678, 8 Sup. Ct. 992, 1257; *Crossman v. Lurman,* 192 U. S. 189, 24 Sup. Ct. 234.

In reviewing the cases on this subject, the court in *Plumley v. Massachusetts,* 155 U. S. 461, 472, 15 Sup. Ct. 158, said:

"If there be any subject over which it would seem the state ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to

be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may indeed indirectly or incidentally affect trade in such products transported from one state to another state, but the circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states."

Sherlock v. Alling, 93 U. S. 99; *Austin v. Tennessee,* 179 U. S. 343, 21 Sup. Ct. 132; *Powell v. Pennsylvania,* 127 U. S. 678, 8 Sup. Ct. 992, 1257; *Meyer v. State,* 134 Wis. 156, 114 N. W. 501.

The provisions of ch. 557, Laws of 1907, under which these defendants were prosecuted and fined, clearly forbid sales without labeling or branding the articles as prescribed. That this legislation was a proper exercise of the legislative authority within the police power of the state we think is established by the authorities heretofore cited. Under these circumstances, the defendants' liberty and property rights secured to them by the state and federal constitutions have not been invaded, and their conviction of the charges preferred against them must be approved.

By the Court.—The judgment in each of the cases separately appealed from is affirmed.

TIMLIN, J. (*dissenting*). I cannot bring myself into agreement with the majority opinion. I suppose it is unquestioned law and will be generally conceded that where a regulatory statute restrains, diminishes, or denies a constitutional right, such as liberty or the use and enjoyment of property, it is the duty of and within the power of the court to inquire whether such statute really subserves any public purpose, giving the legislative predicate that it does so the utmost deference. *Mugler v. Kansas,* 123 U. S. 623, 8 Sup. Ct. 273; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *Schollenberger v. Pennsylvania,* 171 U. S. 1, 18 Sup. Ct. 757; *Dobbins v. Los Angeles,* 195 U. S. 223, 236, 25 Sup. Ct. 18;

Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427. Hence, if a statute based solely upon the preservation of the public health purported to restrain the sale or use of an article of food known by all possessing ordinary intelligence to be wholesome and nutritious, although the article might be caviare to the "unlearned increment," the statute would be declared void because it would in that case be apparent to the court that the law was based upon a clearly apparent error of fact on the part of the legislature as regards the relation of the law to the general public, and such law assuming to restrain liberty or interfere with the use and enjoyment of property must fall because it lacked the support which the statute must have before it can invade in any material degree these constitutional rights. It is conceded by the circuit court and by the majority opinion, I think, that the substance here in question is wholesome and in no wise injurious to health. In any view this is established. When we come to consider such a statute which has no support as preserving the public health or the public peace, but must be upheld if at all on the ground that it is intended to protect the public against deception and fraud, many new considerations arise. First, what deceit or fraud will suffice to uphold such a statute? Will anything in conflict with the most refined ethics suffice? Will fraud upon the public be in such case defined from the viewpoint of *caveat emptor* or *caveat venditor,* etc.? If anything inethical will support such a statute, and we defer in proper degree to the legislature and make the allowance for difference of opinion which we accord to that branch of the government, then there has been discovered a field in which constitutional guaranties are vain and worthless, and in which legislative activity may expend itself in fostering one commercial interest or industry at the expense of another; for trade is practically always inethical. We would by sustaining such laws also invite into the legislative halls the struggle for industrial and commercial gain or supremacy,

and in such case, if experience counts for anything, there is no doubt that the invitation would be eagerly accepted.

Without pursuing these reflections further, my opinion is that the fraud or deceit upon the public which will uphold such a statute and justify reasonable restriction of constitutional rights must be something which is recognized by law as actionable fraud. In other words, there must be damage as well as deception. To use a simple illustration: I do not think a statute imposing a penalty upon any one who sold salt not branded or designated as "chloride of sodium" or "sodium chloride" would be valid no matter what number of persons would refuse to use it under the latter name because they relished it as salt and despised it as sodium chloride. In such case, in most cases which arise, and in the instant case (unless this ground of invalidity appears on the face of the statute), the court, because of the paramount rule of constitutional law involved, must hold the regulatory statute invalid when from judicial knowledge or notice the court can see that the statute can have no such relation to the public peace, health, morals, or welfare as is requisite to uphold the encroachment upon constitutional rights. Great weight will, of course, be given to the assumed determination of this question by the legislature. All this is now elementary law, but there remains its application.

Ch. 152, Laws of 1905, an act entitled as "relating to the sale of syrups, molasses and glucose mixtures," provided that no person should

"sell, offer or expose for sale or have in his possession with intent to sell any syrup, sugar-cane syrup, sorghum syrup, molasses or glucose, unless the same be true to the name under which it is sold, and as defined in the standards of purity for food products as *adopted by the United States Department* of Agriculture and unless the barrel, cask, keg, can, pail or *package* containing the same be distinctly branded or labeled with the true name of its contents as defined in the above-named standards; and no person shall sell, offer or expose for

sale or have in his possession with intent to sell any syrup, sugar-cane syrup, sorghum syrup, or molasses mixed with glucose unless *the mixture be sold as and for compound glucose mixture or corn syrup,* and unless the barrel, cask, keg, can, pail or *package* containing the same be distinctly branded or labeled *'Glucose Mixture' or 'Corn Syrup' in plain Gothic type,"* etc.

Ch. 557, Laws of 1907, under which the plaintiffs in error were convicted, is entitled "An act to amend secs. 1 and 2 of ch. 152, Laws of 1905, . . . relating to the sale of syrups, molasses, glucose mixtures and maple-syrup mixtures, and to protect the public health." It amended the first-mentioned act to read:

"No person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant or agent of any other person, firm or corporation, shall sell, offer or expose for sale or have in his possession with intent to sell any syrup, *maple syrup,* sugar-cane syrup, *sugar syrup, refiners' syrup,* sorghum syrup, molasses or glucose, unless the same be true to the name under which it is sold as defined in the standards of purity for food products as * * * *latest promulgated* by the United States * * * secretary of agriculture, and unless the barrel, cask, keg, can, pail or * * * *other original container* containing the same be distinctly branded or labeled with the true name of its contents as defined in the above-named standards; and no person, *firm or corporation, by himself, officer, servant or agent, or as the officer, servant or agent of any other person, firm or corporation,* shall sell, offer or expose for sale, or have in his possession with intent to sell any syrup, *maple syrup,* sugar-cane syrup, *sugar syrup, refiners' syrup,* sorghum syrup or molasses, mixed with glucose, unless the * * * barrel, cask, keg, can, pail or * * * *other original container,* containing the same be distinctly branded or labeled * * * *so as to plainly show the true name of each and all of the ingredients composing such mixture as follows:* * * * *Third. In case said mixture shall contain glucose in a proportion exceeding 75 per cent. by weight, it shall be labeled and sold as* * * *'Glucose Flavored with Refiners' Syrup,'"* etc.

The words italicised by me in the act of 1905 are omitted from the act of 1907, the italicised words in the act of 1907 are new in that act, and the asterisks in the latter act denote the places where the words omitted from the act of 1905 formerly appeared.

Prior to the commission of the acts for which plaintiffs in error are prosecuted, the United States secretary of agriculture, proceeding under the act of Congress of June 30, 1906, and acting with the secretary of the treasury and the secretary of commerce and labor, made a decision or regulation as follows:

"Washington, D. C., February 13, 1908.

"We have each given careful consideration to the labeling under the Pure Food Law of the thick viscous syrup obtained by the incomplete hydrolysis of the starch of corn and composed essentially of dextrose, maltose, and dextrin. In our opinion it is lawful to label this syrup as corn syrup. And if to the corn syrup there is added a small percentage of refiners' syrup, a product of cane, the mixture, in our judgment, is not misbranded if labeled 'Corn Syrup with Cane Flavor.' [Signed.]"

The accused at the time they acted were then confronted with a Wisconsin statute which on its face authorized them to describe, brand, or label this substance by the same name by which it was lawfully known in interstate commerce and to sell and deal in it within the state under that name, viz., "Corn Syrup." Indeed, the statute went further, and required them to designate this substance as corn syrup, at least after the latest promulgation of the secretary of agriculture on February 13, 1908. But by that part of the statute of 1907 following the first semicolon, that substance which in its unmixed condition may or must be called "corn syrup" under the precedent portion of the same act, must when mixed with other designated substances be called "glucose." Would not such a statute rather authorize deception than prevent it? Does the statute not carry with it the inference that the leg-

islative object is to prevent or make difficult sales of the mixture by giving this substance in the mixture a different name from that given by the statute to it while it is in an unmixed condition? In the simple, says the statute, it shall be called and known as corn syrup; in the compound, the same substance shall be labeled glucose. The law either authorizes a false and misleading designation of the substance in the first place or it prohibits the use of a proper and lawfully authorized designation in the second place. It must be the latter because the term "corn syrup" is truly descriptive of the substance in question by reference to its origin and its appearance to the eye, and because by that portion of the statute in question preceding the first semicolon this substance may and perhaps must be so designated in interstate commerce as well as in intrastate commerce. The one name is composed of German and Latin derivatives and identifies the substance by two of its qualities, origin and appearance. The other name is Greek and identifies the substance by one of its qualities, sweetness. But the former term has been legalized as a name for the unmixed substance and remains so legalized. When the statute in question was enacted the legislature so framed the first part of the statute that the name by which this substance was known or should become known in interstate commerce under the rulings of the secretary of agriculture should also be the lawful name by which the substance should be known in the internal commerce of the state. This part of the statute, considered with the order of the United States secretary of agriculture of 1908, establishes, therefore, that designating the substance in question by the words "corn syrup" does not deceive. In the nature of things it could not deceive or defraud to describe one ingredient of a mixture by its proper, legal, and authorized name which it bore before being put into the mixture. The legislature did not determine that this was a false description, because it had before the amendatory act of 1907 and in and by the latter act au-

thorized the use of these words to designate the substance in question. That the legislature did not by this act of 1907 intend protection against fraud or deception is also apparent from the title thereof, wherein it is stated that the object of the act is "to protect the public health." The title of an act is not potent to limit or enlarge the words of the act, but for ascertaining the mischiefs which in the legislative mind the statute was aimed to prevent it has great force. Particularly is this true in a state like Wisconsin, where, before being put on their passage, acts are read merely by reading the title. *Eby's Appeal,* 70 Pa. St. 311, 314; *Conn. Mut. L. Ins. Co. v. Albert,* 39 Mo. 181; *U. S. v. Fisher,* 2 Cranch, 358, 383, and cases in Rose's Notes; *U. S. v. Palmer,* 3 Wheat. 610, 631; *Price v. Forrest,* 173 U. S. 410, 427, 19 Sup. Ct. 434; *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295. The legislature of Wisconsin enacted this law to preserve the public health, just as it declared in the title it did, but under the impression, now shown to be erroneous, that the prepared and partially hydrolized starch of corn was an unwholesome food, and the statute cannot and should not now be attempted to be upheld upon the different ground of prevention of fraud. It also appears, I think, as matter of fact, that there could be no deception of the public by the label in question. The article was sold as "Karo Corn Syrup with Cane Flavor." The word "Karo" I take to be a mere trade-name or trade-mark. The words "corn syrup" are not only a lawful but also a popular designation of the substance otherwise called "glucose," and there is no controversy but that the article sold was corn syrup or glucose flavored with refiners' syrup. Returning again to the order of the secretary of agriculture of date February 13, 1908, made pursuant to the act of Congress of June 30, 1906, we find this:

"In our opinion it is lawful to label this syrup as corn syrup. And if to the corn syrup there is added a small percentage of refiners' syrup, a product of cane, the mixture, in our judgment, is not misbranded if labeled 'Corn Syrup with Cane Flavor.' "

This is quoted again because it bears on the question of fact as well as on the question of law appearing on the face of the statute. It shows that the defendants were dealing in or selling the article under a name authorized and lawful in interstate commerce, and also under a name with which the public must have been familiar because of its extensive use in commerce. Add to this that the statute of Wisconsin for 1905 first quoted authorized this name, that books, newspapers, market reports, dictionaries, and encyclopedias speak of it as cereal syrup or as corn syrup, and that these words are in no respect false or misleading aside from the statute, but truly represent the origin and appearance of the substance, and it appears to me that there could have been no deception or fraud unless upon a class of people who by reason of ignorance have little or no knowledge of current speech, writings, statutes, trade, or commerce, and possess an unreasoning prejudice against anything named glucose, but find the substance, if labeled "corn syrup," palatable and cheap, and would purchase and use it if labeled "corn syrup," but would not if labeled "glucose." I do not think that, even conceding the existence of such a class, a police regulation based upon protecting the prejudice of the ignorant would be at all valid, but rather that this would be an additional ground of invalidity because of there being two permissible names, each of which truly described the substance, and the legislature compelled the selection of one which would limit the owner's sales and damage his trade. The oleomargarine cases are irrelevant. Those are cases of deceit by disguise and damage by sale of the cheap and inferior as and for the costly and superior article. This is a case of two names for the same substance. One describes it at least as well as the other. The defendants are compelled to use the first to identify the pure substance.

Without prolonging this dissent further, I think such legislation is unconstitutional both under the constitution of this state and under the XIVth amendment to the constitution of

the United States. It tends to deprive the citizen of liberty and property contrary to law by requiring him to change the name and designation under which he purchased this property, and give it some name or designation instead offensive to some part of the trade without any legal foundation or reason for so doing. I make no question but that if it had been shown that the article was injurious to health, or the sale of it constituted a legal fraud, the state in the exercise of its police power might restrict its sale by requiring it to be branded with some unpopular name, if that name alone truly designated the substance. That would be a reasonable police regulation, interfering with interstate commerce to some extent, but not to an unlawful extent. It would restrict and impede that commerce by forbidding the persons engaged therein from selling or further dealing in the articles of commerce after such articles had reached this state, but it would be justified by the necessities of the case. I also think there the power of the state legislature ends, and, when the state regulation is shown to have no foundation in the police power of the state, such regulation becomes ineffective to restrain or interfere with the further traffic by the person engaged in interstate commerce in such article. So that both on the ground that the statute restricts without warrant the constitutional rights of the accused and that it restricts interstate commerce by restraining the sale of such articles of commerce after they have reached this state without any valid reason for such restriction, I am convinced that the judgment of the court below should be reversed. *Jewett Bros. v. Smail,* 20 S. Dak. 232, 105 N. W. 738; *Brown v. Maryland,* 12 Wheat. 419; *Schollenberger v. Pennsylvania,* 171 U. S. 1, 18 Sup. Ct. 757; Cooke, Commerce Clause, §§ 91, 99, and cases.

MARSHALL, J. I concur in the dissenting opinion of Mr. Justice TIMLIN.

SPENCE and others, Appellants, vs. CITY OF MILWAUKEE and others, Respondents.

April 6—May 24, 1910.

Municipal corporations: Assessments for street improvements: Action to set aside: Estoppel: Costs: Improper insertion in judgment: Review.

1. The evidence in this case is *held* to sustain findings by the trial court to the effect that in the making of certain special assessments for street improvements all requirements of the city charter of Milwaukee were complied with.
2. The lotowners having had notice of the proceedings resulting in the assessments upon their lots, and the property having been enhanced in value far more than the cost of the improvements, and the owners severally benefited to the amount of the benefits assessed, they are estopped from maintaining an action, commenced after the completion of the work, to set aside the assessments.
3. A party claiming that costs have been improperly inserted in a judgment in violation of sec. 2894*a*, Stats. (1898), should bring the matter to the attention of the trial court and obtain a ruling thereon before review can be had in the supreme court.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This action was brought by the plaintiffs as owners of the real estate described in the complaint against the defendant city of *Milwaukee, William H. Graebner,* city treasurer, and James O'Donnell, the contractor who performed the work, asking that the special assessments complained of be declared illegal, null, and void, and the special assessment certificates issued thereunder declared null and void and set aside, and for general relief. Pending the action the defendant O'Donnell died, and the *Milwaukee Trust Company* was appointed administrator and the action revived as to O'Donnell. The property affected by the assessment and owned by the plaintiffs is described as follows: Lots Nos. 21 and 31, in block 1, and lots Nos. 9, 10, 11, 13, and 15, in block 2, in Cold

Spring Heights subdivision, in the southwest and northwest quarter of section 24, in the Nineteenth ward of the city of *Milwaukee,* each of which lots has a frontage on Thirty-sixth street, which is a public highway of the defendant city, of thirty feet and being 120 feet in depth, except lot 31 in block 1, which has a frontage on said Thirty-sixth street of 53.84 feet and an extreme depth of 79.91 feet and is triangular in shape.

The defendants city of *Milwaukee* and *William H. Graebner* answered justifying the regularity of the proceedings on the part of the city resulting in the special assessment, and setting forth, among other things, that all provisions of law were duly complied with and the assessment lawfully and regularly made, and alleging that the improvements made resulting in such assessment were of great benefit to the plaintiffs' premises and enhanced and increased the value thereof, and that such assessments were made according to the benefits and damages to the premises; that the plaintiffs had notice and knowledge of all the various proceedings taken by the defendant city, its common council and board of public works, city engineer, and contractors, and all other officers of said city at the time and during the pendency of the various proceedings had to make the improvements alleged in the complaint.

The defendant O'Donnell also answered setting up that he did the work under contract which resulted in the special assessment, and that he held certificates against lot 21, block 1, for $78.03, and a certificate against lot 31, block 1, for $156.24, of which sum only $100 is assessed against said lot, and the remainder, $56.24, is payable to the defendant out of the ward fund of the Nineteenth ward, and that other certificates described in the complaint were by said defendant duly assigned to the Milwaukee Lumber Company, a Wisconsin corporation. This defendant further set up notice on the part of the plaintiffs during the pendency of the proceedings,

and also that the lots were greatly benefited and enhanced in value by the improvements.

The court found all the facts in favor of the defendants, and, among other things, found that all the proceedings respecting the assessment and levy of the special assessment complained of were regular and valid and greatly enhanced the value of the lots against which assessments were made, and that the plaintiffs had notice that the improvements were being made and the property enhanced in value more than the value of the improvements, and, the assessments being reasonable, lawful, just, and equitable, the plaintiffs are estopped from maintaining the action, and that since the improvements the plaintiffs have sold several of the lots owned at the time of the commencement of the action.

As conclusions of law the court found that the defendant city by the adoption of the resolutions mentioned in the complaint had authority and jurisdiction to make the improvements, that the abutting property was chargeable with the benefits to the amounts assessed thereon, that the assessments so made were just and equitable and in all respects complied with the law and charter of the city and are valid, and that judgment be entered dismissing the complaint with costs against the plaintiffs. Judgment was entered accordingly, from which this appeal was taken.

C. H. Hamilton, for the appellants.

For the respondents the cause was submitted on a brief by *John T. Kelly,* city attorney, and *Clinton G. Price,* assistant city attorney, and by *Dorr & Gregory,* attorneys for *Milwaukee Trust Company* as administrator.

The following opinion was filed April 26, 1910:

KERWIN, J. The findings set out in the statement of facts show full compliance with the provisions of the city charter, and if they are supported by the evidence the judgment below must be sustained. The findings are attacked by counsel

for appellants on the ground that it appears conclusively that the assessment was made upon the so-called front-foot rule, and that there had been no proper view of the premises. The following authorities are relied upon in support of these propositions: *Kersten v. Milwaukee,* 106 Wis. 200, 81 N. W. 948, 1103; *Friedrich v. Milwaukee,* 118 Wis. 254, 95 N. W. 126; *Haubner v. Milwaukee,* 124 Wis. 153, 101 N. W. 930, 102 N. W. 578; *Loewenbach v. Milwaukee,* 139 Wis. 49, 119 N. W. 888. In all of the foregoing cases it was conclusively established by the findings and the evidence that the provisions of the charter had not been complied with. In *Kersten v. Milwaukee, supra,* the court found that the assessment was arbitrary and fraudulent for the reason that the board did not consider the benefits to the owners of the adjoining property nor the injury which might result to the owners by reason of the work, but made an arbitrary assessment, based solely upon the cost of the work in front of or abutting upon the lots, respectively, at the uniform rate of $1 per front foot. To the same effect is *Friedrich v. Milwaukee, supra.* In *Haubner v. Milwaukee, supra,* the court held:

"An assessment by the board of public works of the benefits and damages to abutting lots by reason of the grading of a street in Milwaukee was made without separate consideration of the several lots, although they were very differently affected by the improvement; it was not made at the time of viewing the premises, but at a different time and in the office of the board; and it assessed a uniform sum per front foot as benefits along the whole street, and awarded no damages whatever for injuries, and that under the city charter such assessment was void."

In *Loewenbach v. Milwaukee, supra,* the court held that in making an assessment of benefits and damages arising from a street improvement the board of public works should ascertain what the benefits and damages amount to on each parcel of land, instead of assuming that the benefits are equal to the cost of doing the work.

In the instant case, as appears from the statement of facts, the court below found that all the proceedings were regular and the provisions of the charter complied with. Counsel for appellants refers us to some evidence which, standing alone, would seem to support his contention that the front-foot rule was observed, and also that a proper view of the premises was not made, but an examination of all the evidence fully convinces us that the findings on these facts, as well as all others, are well supported by the evidence. It may also be observed, in passing, that the court found upon sufficient evidence that the appellants had notice of the proceedings resulting in the assessments, that the property was enhanced in value far more than the value of the improvements, and the abutters severally benefited to the amount of the benefits severally assessed, and that the appellants are estopped from maintaining the action. It seems, therefore, upon the established facts and under the decisions of this court, regardless of other questions before discussed, that the appellants are estopped from maintaining this action. *State ex rel. Schintgen v. Mayor, etc.* 101 Wis. 208, 77 N. W. 167; *Beaser v. Barber A. P. Co.* 120 Wis. 599, 98 N. W. 525; *Lawton v. Racine,* 137 Wis. 593, 119 N. W. 331.

It follows that the judgment of the court below must be affirmed.

By the Court.—The judgment is affirmed.

The appellants moved for a rehearing. The following opinion was filed May 24, 1910:

PER CURIAM. A motion in this case was made for a rehearing and to change the mandate respecting costs. It is urged that a rehearing should be granted on the ground that the findings are not supported by the evidence. Upon further examination of the record we think the contention is without merit. As to changing the mandate we find no war-

rant for so doing in the record. Conceding, without deciding, that the judgment was entered more than sixty days after the findings were filed, we discover no ground for changing the mandate. It does not appear from the record that the alleged error was ever brought to the attention of the court below. If the clerk improperly inserted costs in the judgment the matter should have been brought to the attention of the court below and a ruling obtained before review can be had here. *Blomberg v. Stewart,* 67 Wis. 455, 30 N. W. 617.

The motion is denied with $25 costs.

TOPOLEWSKI, Respondent, vs. PLANKINTON PACKING COMPANY, Appellant.

April 7—May 24, 1910.

(1–4, 13) *Malicious prosecution: Probable cause: Advice of attorney: "Full and fair statement of all the facts:" Conviction: Reversal: Fraud.* (5–8) *Corporations: Torts of agents: Ratification: Who are agents.* (9–11) *Punitory damages: When allowed: Court and jury: Liability of corporation.* (12–14) *Presumptions: Knowledge of the law.*

1. If one before instituting a criminal prosecution states to a duly licensed attorney at law, fully and fairly, all the facts and circumstances within his knowledge or of which he has reasonably reliable information, and acts upon the advice of such attorney respecting whether such facts render the defendant guilty of a criminal offense, he has, in the legal sense, probable cause for his action rendering him immune from liability for malicious prosecution.
2. The foregoing rule applies liberally to informers, in that the attorney consulted need not necessarily be the public prosecutor, and the term "full and fair statement of all the facts" does not call for all facts reasonably discoverable, or require the informer to make diligent inquiry in respect thereto.
3. In case of a criminal prosecution being commenced upon the initiative of a private person, and the action being prosecuted

to conviction and judgment, without collateral fraud, such judgment will stand as probable cause for such commencement, rendering such person immune from liability for malicious prosecution, though the judgment be reversed on appeal for error committed upon the trial; even error in holding that the facts claimed by such person to exist constituted guilt of the criminal charge.

4. The fraud which will take a judgment of conviction out of the rule stated, is fraud extrinsic, not in respect to matters litigated and passed upon in the trial of the action.

5. If the agent of a corporation, acting within the scope of his duties, even though abusing his authority in that he uses methods not expressly or impliedly authorized, or which could reasonably have been anticipated, commits a remediable wrong to another, causing that other recoverable damages, the corporation as well as the agent is liable.

6. In case of the agent of a corporation, assuming to act in its behalf, committing a remediable wrong to another by some act outside the scope of his authority, if the corporation, with knowledge of the facts, ratifies his conduct, it is liable the same as if such act was done by its authority.

7. In case a person to whom the general management of a corporation is intrusted by corporate action, or one who is permitted to exercise such authority, employs another to perform some service for the corporation, such employment makes such other a corporate agent as to all acts done by him within the scope of his duties, and in case he acts outside such duties, its agent so far as such acts are subsequently ratified.

8. Ratification by a corporation of the acts of a person falsely assuming to have authority in the premises, may be established, circumstantially, as by conduct of those intrusted with the governing authority or general management of the corporate affairs clearly showing approval.

9. Punitory damages are not allowable as matter of right, nor are such damages allowable, at all, unless the wrongdoer in perpetrating the wrongful act is actuated by bad intent to injure, either actual or with such reckless disregard of consequences as to be equivalent thereto.

10. It is for the court, in an action for damages sounding in tort, to determine whether, in any reasonable view of the evidence, punitory damages would be proper, and if so, to leave it to the jury to allow such damages or not, in their discretion, informing them, adequately, that such an allowance is not to be made out of any regard for the plaintiff but solely as a punishment of the defendant and a warning to others, and is to be measured out as to amount solely in that view.

11. Punitory damages are not allowable, generally, against a corporation for the malicious act of its agent within the scope of his authority or otherwise; its liability is limited, in any case, to actual damages, in the absence of authority to commit the wrong with its malicious characteristic, or subsequent ratification of its commission with knowledge of the facts.
12. The maxim, "Every one is presumed to know the law," does not obtain literally and generally; it is limited by the reason for the rule, viz.: to prevent violators of the criminal code from escaping punishment on the ground of ignorance of the law and violators of private rights, escaping liability for actual loss thereby inflicted on such ground.
13. If a person acts, in commencing a criminal prosecution, upon the advice of one duly licensed to practice the profession of law, and such advice proves to be wrong, he cannot be rightly held to have acted in bad faith because of a legal presumption that every one knows the law.
14. The maxim, "Every one is presumed to know the law," does not prevail against the real truth as to any particular situation, except as regards punishment for a criminal offense, or responsibility for actual damages for violation of private rights.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

Action to recover compensation for false imprisonment and malicious prosecution.

For the first cause of action it was alleged that defendant, a corporation, falsely and maliciously claiming that plaintiff was guilty of having committed the crime of larceny of its goods, to wit: three barrels of meat and leaf lard of the value of $55.26, caused him, without legal proceedings, to be restrained of his liberty for the period of one hour and then to be delivered to the public authorities and to be restrained of his liberty in the police station at Milwaukee for the period of two hours.

For a second cause of action it was alleged that defendant, maliciously and without probable cause, in due form of law, caused plaintiff to be arrested and prosecuted for the crime of larceny of its goods, as stated in the first cause of action; that

he was found guilty as charged; that upon a review of the conviction on writ of error it was held that the facts established in the action did not constitute a criminal offense and the conviction was, therefore, reversed and cause remanded for a new trial; and that, subsequently, such proceedings were duly had in the trial court that the cause was again heard, resulting in its being decided that the facts claimed to exist, of which proof was made and considered, did not show plaintiff to be guilty of any criminal offense and he was, therefore, upon motion discharged.

Damages were claimed to have been sustained by plaintiff to the extent of $50,350.

Defendant, for an answer to the first cause of action, admitted that, at the time and place alleged, plaintiff was restrained of his liberty on a charge of larceny, and was, while so restrained, placed in custody of the chief of police of the city of Milwaukee and that he, subsequently, obtained his release on bail; and put in issue allegations as to aggravated character of the restraint.

Defendant, for an answer to the second cause of action, admitted (1) its alleged corporate character; (2) the claim that plaintiff, previous to his detention, was a retail meat dealer in the city of Milwaukee and accustomed to purchase stock of defendant; (3) that one Layer, at the time of such detention, was in its employ; (4) that plaintiff was prosecuted for larceny and convicted; that the conviction was reversed and on a retrial he was discharged, as alleged, but denied that the prosecution was maliciously commenced or carried on, or that the same was without probable cause, or, in any event, that he was damaged as claimed.

The evidence tended to prove, or was to this effect: On and prior to October 14, 1905, one Moody was defendant's secretary, one Booth its general manager, and said Layer manager of its wholesale department with one White as an assistant, and that one Dolan was one of its employees up to

a few days before such date. Prior to the particular date a suspicious shortage was discovered in Layer's department. Circumstances came to his knowledge arousing suspicion that plaintiff, in his dealings with defendant, by the aid of dishonest employees, was the cause of the difficulty. Layer was informed by Dolan and another employee that plaintiff had endeavored to conspire with them to defraud defendant. The general manager's son informed Layer of having overheard a conversation between plaintiff and Dolan in regard to stealing meat from defendant. The conversation was, by consent of the secretary, brought about by Dolan in the hearing of Booth for the purpose of discovering whether the suspicions as to plaintiff were correct, and if so, to lay a plan whereby he might take meat, intending to steal the same, and under such circumstances as to be detected in the act. The younger Booth's presence within hearing was unknown to the accused. The conversation confirmed the existing suspicion. Thereafter Layer consulted with one of the city detectives and later it was arranged with Dolan to trap the plaintiff into stealing meat, if he were disposed to do so. Dolan ceased to be an employee of defendant some two weeks prior thereto. He was indebted to plaintiff, who requested him to pay the indebtedness by aiding plaintiff to get meat from defendant without either party paying therefor. The two agreed that Dolan should cause four barrels of meat to be placed on a loading platform in the morning in the customary place for customers to receive goods. Layer and Booth, unknown to plaintiff, were behind Dolan in the scheme. Plaintiff, by connivance of the three, was deceived into the belief that Dolan was still at work for the defendant. Dolan promised to be at the platform the next morning and by connivance with Booth and Layer kept his promise and was, apparently, on duty as an employee. The four barrels of meat were placed on the platform convenient for plaintiff to consummate the scheme arranged between him and Dolan

and the latter was at his post as agreed with Booth and Layer. In due time plaintiff arrived with a conveyance to enable him to remove the meat. He loaded three barrels into his wagon, one of defendant's employees assisting, and drove off. The universal custom in defendant's business, which was well known to plaintiff, was for customers to visit the office, give orders and receive tickets for the meat desired before its being placed on the platform, the ticket to be thereafter turned in showing delivery. The manner in which the meat was taken in this instance was entirely out of the ordinary. Layer had a man on the watch when plaintiff took the meat, who followed him and induced him to return to the office. There he was met by a detective whom Layer had procured to be present. The detective, without warrant, as desired by Layer, took plaintiff in charge and the two rode to the police station. Layer, without delay, visited the district attorney's office and related to him the story of why plaintiff had been suspected of swindling defendant, and of the plan laid for detecting him and the result. Particularly, he informed such attorney that before laying the plan a city detective was consulted, and further informed the attorney of the details of such plan and how it worked out, and was advised that the facts rendered plaintiff guilty of the crime of larceny. Thereupon, under the district attorney's advice, Layer went to a designated assistant's office and, as directed, swore out the warrant for the arrest. Thereafter he acted only as a witness when called upon.

On the trial of the criminal charge the facts, as stated, were brought out. Plaintiff testified in his own behalf that he had no purpose to steal the meat but ordered it through Dolan, whom he supposed to be an employee of defendant. Dolan was not called to testify in the criminal prosecution though through no fault of defendant. The result was that plaintiff was found guilty upon the theory that his story that he purchased, or supposed he purchased, the meat of defend-

ant through its sales agent Dolan, was false. The conviction was, in due course, reversed upon the ground that placing of the meat on the loading platform for the purpose of having plaintiff take it if criminally disposed, and the presence and apparent consent of defendant's employees to the taking, rendered the transaction barren of the element of trespass essential to larceny. Upon the second trial, which occurred on the same testimony as before, following the decision of this court, the action was dismissed. Plaintiff told the same story on the trial of this case as in the criminal case. He claimed, as before, that he bought the meat through Dolan, whom he supposed was defendant's agent; that when he drove to the platform for the meat Dolan was there ostensibly as an employee in authority; that he asked an employee, Klotz, which was his meat, and, upon the four barrels being accordingly pointed out, he took three of them, telling such employee, who was the loading boss, to send up the other barrel with the bill. Klotz testified somewhat differently than plaintiff. He testified that plaintiff asked him, at first, if the four barrels were his and later claimed them, and thereupon he, Klotz, loaded, or helped plaintiff to load, three of them on his wagon, and that thereupon the latter gave directions and drove off, as he testified, and that thereafter the witness placed plaintiff's name on the fourth barrel.

The claim was made on the criminal trial, as on the trial in this case, based on substantially the same evidence in the last instance as in the first, that the shortage in defendant's sales department was attributable to defendant's employees, and that such employees, in order to cover their own dishonest conduct, laid and executed a plan to induce plaintiff to take the meat from its loading platform, believing that he was rightfully doing so as purchaser of the goods, yet under such circumstances as to indicate a criminal purpose. The court, in the first trial, found the issue of fact in that and all other respects against the accused. No one of such find-

ings has been, in reality, disturbed. As before indicated, the conviction was reversed upon the theory that the findings of fact were warranted by the evidence, but that such facts did not constitute the crime of larceny.

In addition to the proofs received as before indicated, there was evidence on the subject of damages. The court submitted the cause to the jury resulting in a finding in favor of plaintiff, as follows: (1) Plaintiff did not co-operate with defendant's agents to obtain the meat without paying therefor. (2) Defendant did not, through its agent, cause the arrest of plaintiff honestly believing he had stolen the meat. (3) Defendant did not, by its agent, act in good faith and without malice in causing him to be restrained of his liberty and taken to the police station. (4) Plaintiff was damaged by the false arrest and imprisonment to the extent of $5,500, and in case he is entitled to recover should also have $675 as punitory damages. (5) Defendant did not, before the complaint was sworn to, by its agent, fully and fairly state to the district attorney all the material facts of which he had knowledge or information bearing on the supposed larceny. (6) Defendant did not, by its agent, believe the statements made to the district attorney to be true. (7) Defendant did not, by its agent, in instituting the prosecution, act in good faith. (8) Defendant did not, by its agent, when the prosecution was commenced, have probable cause to believe the plaintiff was guilty as charged. (9) In instituting the prosecution, defendant acted maliciously. (10) If the plaintiff recovers on the cause of action for malicious prosecution he should have $8,000 as compensatory damages and $825 as punitory damages.

The court required plaintiff, as a condition of a motion for a new trial being denied, to consent to take $1,000 as compensatory damages for the false imprisonment. The condition was complied with and thereupon, on motion, judgment was rendered in plaintiff's favor for $10,500 damages and

$176.44 costs, exceptions being saved to raise the questions discussed in the opinion.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Wm. Quarles,* of counsel, and oral argument by *Wm. Quarles.*

For the respondent there was a brief by *Lenicheck, Fairchild & Boesel,* and oral argument by *E. T. Fairchild* and *F. T. Boesel.*

MARSHALL, J. Though there is some controversy between counsel in respect to the matter, and the trial court seems to have thought the evidence warranted such controversy, it is a grave question, on the record, as to whether the evidence does not conclusively show, independently of the result of the criminal action, that appellant's agent, in commencing it, acted in good faith upon the advice of the public prosecutor of Milwaukee county after having fully and fairly stated to him all the facts of which such agent had knowledge or information bearing on the subject. If such be the fact, then the element of probable cause for the prosecution existed, the verdict of the jury was wrong in respect thereto, and the cause of action for malicious prosecution should have been dismissed.

The law is too well settled to be open to discussion, that the action of malicious prosecution will not lie against one who, before acting against the other party, fully and fairly submitted all the facts and circumstances within his knowledge, or of which he had reasonably reliable information, to an attorney at law, particularly in case of its being the public prosecutor, and proceeded in good faith upon his advice that such facts constitute guilt of the offense charged. *Small v. McGovern,* 117 Wis. 608, 94 N. W. 651.

But, conceding that, as an original matter, the question of whether appellant's agent satisfied the foregoing rule to have been sufficiently involved, on the evidence, to require sub-

mission of it to the jury, was it a jury matter in view of the fact that the evidence conclusively showed that the agent submitted all the facts within his knowledge and of which he had reasonably reliable information, in respect to which evidence was produced on the first trial of the criminal action, and that the case, on the evidence, as to plaintiff's guilt, was the same on such first trial as on the second and upon the trial of this action, and that by the decision at first as to the facts, supposed by the public prosecutor to probably exist, relying on appellant's agent for information in the matter, were found to exist, which decision has never been, in reality, set aside, except for insufficiency in law to constitute guilt—that the public prosecutor, upon whom such agent had a right to and did rely, and the trial court, till guided by the decision of this court, believed such facts constituted a criminal offense, as charged, and acted accordingly?

The court, in the criminal prosecution, having found the facts, as claimed by appellant's agent, to exist, contrary to the claim of respondent then made and made again on the second criminal trial and again on the trial of this action, from which finding the respondent could not, as clearly shown by the review in this court (*Topolewski v. State,* 130 Wis. 244, 109 N. W. 1037), have escaped punishment for being guilty of the crime of larceny, had not the opinion of the public prosecutor and the trial court, as to the legal effect of facts, been overruled—can it yet be said that appellant, through its agent, did not have probable cause for instituting the criminal prosecution?

Should appellant be mulcted in damages, and punished punitively as well, for not knowing the law better than a state officer, charged with the duty of prosecuting the case, and the court, charged with the duty of originally applying the law to the facts?

Is it true that, though a person, acting upon the advice of a public prosecutor as to the legal effect of the facts, takes the

initiative in a criminal prosecution, and conviction follows, nevertheless, whether he is in danger of being charged as a malicious prosecutor, is contingent upon whether his adviser and the court mistook the law?

The highly unreasonableness of affirmative answers to the foregoing suggests that the truth of the matter must be in the negative. The mere statement of the propositions would seem to be sufficient to indicate correctly what the law is, assuming, as we may, that it is fairly what it ought to be, viz.: that a judgment in a criminal prosecution obtained without collateral fraud, though subsequently reversed, is conclusive evidence of probable cause for the prosecution.

The logic of the foregoing seems unanswerable, though it is true, as claimed by counsel for respondent, there is much conflict in judicial authorities in respect to the matter; some holding that the result of a conviction in a criminal prosecution, in the absence of collateral fraud, though reversed on appeal, is conclusive evidence of probable cause for instituting it; some holding that it is so conclusive unless obtained by fraud or perjury in the action, and some holding that, in any event, it is only *prima facie* evidence of probable cause. This court has never had occasion to speak on the subject. However, it has upheld the rule that advice of counsel, upon a reasonably fair statement of the facts under all the circumstances, constitutes probable cause, most liberally in favor of defendants in malicious prosecutions, holding that even advice of private counsel satisfies the rule, also that "full and fair statement of all the facts" does not require statement of all the facts discoverable, or that the informer should even make diligent inquiry to ascertain the facts. *King v. Apple River P. Co.* 131 Wis. 575, 111 N. W. 668.

The reason for the foregoing rests in sound public policy as well as fairness to litigants. The idea is that the administration of the criminal law should not be embarrassed by such

dangers to informers as will efficiently deter them from making known to professional legal advisers such information as they may have respecting probability of crime having been committed and the guilty parties; that so long as they act honestly they should have complete immunity from consequences. Such is the trend of even the written law as evidenced by numerous enactments rendering offenders immune from prosecution, criminally, who have been examined under oath in search of information upon which to institute prosecutions. Logically, it would seem, the unwritten law of this state should be that a conviction in a criminal prosecution, though reversed on appeal for any reason, is conclusive evidence of probable cause, rendering the person who instituted the proceedings immune from being successfully charged as a malicious prosecutor. In case a court has before it evidence, which, in its judgment, renders the accused guilty of the offense charged against him, it would look like a travesty on justice to hold that a person who instituted the prosecution, acting under professional advice based on the same appearances, did not have reasonable ground to believe the man guilty.

It would take much time and space to cite and discuss the conflicting adjudications on the subject before us. As an original proposition, in our judgment, the logic of the unwritten law of this state leads to the conclusion that a conviction in a criminal prosecution should stand as probable cause for its commencement, as regards the person who instituted it, and irrespective of any disturbance of the judgment on appeal. But, if such were not the case, this court would be inclined to reach the same result in choosing between the three conflicting lines of authority, because of its uniform custom, in case of such conflicts, there being no great preponderance in numbers and logic in favor of a particular doctrine, to follow that of the federal supreme court. That

court reviewed the conflict in question in *Crescent City L. S. Co. v. Butchers' Union S. H. Co.* 120 U. S. 141, 159, 7 Sup. Ct. 472, 481, and declared the true rule to be that:

"The judgment or decree of a court having jurisdiction of the parties and of the subject matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal. . . ." That rule "was not established out of any special regard to the person of the party. . . . It will avail him as a complete defense in an action for malicious prosecution, although it may appear that he brought his suit maliciously for the mere purpose of vexing, harassing, and injuring his adversary. The rule is founded on deeper grounds of public policy in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them." It "has respect to the court and to its judgment, and not to the parties, and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from its force." "Neither misconduct nor demerit can be imputed to the court itself. The record of its proceedings imports verity; its judgment cannot be impugned except by direct process from superior authority. The integrity and value of the judicial system, as an institution for the administration of public and private justice, rests largely upon this wholesome principle."

There is no mistaking the meaning of that emphatic language. It was used after reviewing many cases bearing on the subject, some of which limited the rule as to immunity by judgment, to judgment "not obtained by undue means." It discarded the exception permitting raising a jury question as to whether a judgment was obtained by undue means notwithstanding its being between the parties free from collateral attack, except for extrinsic or collateral matters.

Our conclusion is that a judgment not procured by fraud

against a defendant in a criminal prosecution, though reversed for error, is conclusive proof of probable cause for commencing the prosecution, and that the effect of such judgment in that regard cannot be impaired by trying over again in an action for malicious prosecution, issues of fact raised, or proper to have been raised, and litigated on the former trial; that the term "fraud" in procuring the judgment, used by the federal supreme court, in the expression "no misconduct or demerit" of the parties, "except in procuring the judgment itself, can be permitted to detract from its force," refers to fraud extrinsic and collateral, not as to a matter involved and litigated and decided in the action, as for instance, in this case, whether the story of respondent or that of Dolan and others, where there was a conflict, is true.

It follows that the case, as to the second cause of action, should have been taken from the jury. The situation created by the judgment in the criminal action, as regards immunity to appellant from being successfully charged with want of probable cause for instituting the prosecution, was in no wise changed by the reversal for error. There was no proof of facts extrinsic impairing that situation. There was only proof to submit, as in the criminal case, the question of whether respondent's story of how he came to take the meat was true, which story the court in such case, in effect, found to be untrue and which finding, with others, as we have seen, has not been, in reality, disturbed, but found insufficient in law to constitute guilt.

It is conceded that there was a false imprisonment of respondent for a brief period; from the time he was taken charge of by direction of defendant's manager, Layer, till he was arrested on the warrant. The exact length of time does not appear from the evidence, but it sufficiently appears to have been less than one hour and not to have been characterized by any act of an aggravating nature. He was merely, without protest, taken in charge by a city detective at the

direction of appellant's manager, immediately escorted to the police station, which was a short distance away, he driving his own horse, apparently as ordinarily, and then, without much delay, placed under arrest on a proper warrant. For whatever damages he suffered, under all the circumstances, by reason of this brief illegal restraint, it must be conceded appellant is liable, if it is chargeable with the misconduct of Layer; otherwise not.

It must be conceded that, if the agents of appellant acted within the scope of their employment in committing the wrongful act, then it is liable, notwithstanding they may have used means within such scope which appellant did not authorize and had no reasonable ground to expect would be resorted to. The law on the subject has been stated by this court with sufficient definiteness to render more than merely restating it, as a rule, unnecessary:

"The master is liable for the negligent or wrongful acts of his servant committed in endeavoring to perform a duty delegated to him by the master, and this is so notwithstanding the method adopted by the servant may not have been authorized, and may even have been prohibited, by the master." "The test is whether the act was done in the prosecution of the master's business." *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276.

"A master is liable for the tortious act of the servant done in the scope of his employment, though the master did not authorize it, or even though he forbade it." *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 498, 110 N. W. 424, 426.

While it cannot be held, ordinarily, that a corporation or an individual in conferring power to act within a particular scope, intended to confer authority to abuse such power, or had reasonable ground to expect that it would be abused, such corporation or individual is, nevertheless, responsible for such abuse and, also, whether it occurs within the scope of the duty or not, if with full knowledge of the facts the conduct is

ratified. That is the effect of *Pfister v. Milwaukee Free Press Co.* 139 Wis. 627, 121 N. W. 938.

The law governing the subject having thus been clearly declared by this court, we forego referring to authorities elsewhere which have been numerously cited to our attention.

It seems that the facts of this case fall fairly within the doctrine stated. The whole conduct of appellant's affairs seems to have been left to Moody, the secretary, and Booth, the general manager, with Layer as manager of the wholesale department. There was no president and, for aught appearing, no vice-president. That Booth and Moody had authority, under the circumstances indicated, incident to their trusts, to protect the corporate business from unlawful depredations, and that prosecution of depredators, such as it was supposed respondent to be, was a legitimate means to that end, and within the scope of their employment in that regard, seem plain. Such being the case, it is considered that whatever Layer, the sales manager, did to protect the business, by precedent direction of those in charge thereof and within the scope of such direction, and whether the means employed were or were not legitimate, and whether he acted by precedent direction or not, if his conduct was afterwards ratified by the corporation by approval of those in general charge of its affairs—the corporation did, as regards, at least, compensable injuries to them.

The evidence is clear that the general manager impressed strongly upon the sub-manager, Layer, the necessity of apprehending those who were guilty of defrauding the company and that whatever he subsequently did was pursuant thereto. His act in causing the irregular illegal restraint of respondent was, at the best for appellant represented by its general manager, Booth, an abuse of power in the execution of a trust. But it satisfactorily appears that, after Layer's conduct came to the knowledge of Booth and all in authority, they not only did not disaffirm it, but ratified it. The con-

duct of all representing appellant, from first to last, shows that the act of Layer had all the corporate approval it could have had other than by precedent authorization or subsequent ratification by the board of directors, and no such formal authorization or ratification was necessary to make his act in legal effect the corporate act. Circumstantial ratification, conduct by those intrusted with the whole power of the corporation clearly indicating approval of the wrongful act of the agent in performing his duties, is a sufficient ratification. That is the effect of *Pfister v. Milwaukee Free Press Co., supra,* following *Bass v. C. & N. W. R. Co.* 42 Wis. 654, and *Patry v. C., St. P., M. & O. R. Co.* 77 Wis. 218, 46 N. W. 56.

So it is considered that the court did not commit error in refusing to take the claim for false imprisonment from the jury upon the ground that appellant was not responsible for the conduct of Layer.

Error is assigned because the court instructed the jury, in respect to the cause of action for false imprisonment, that they could allow compensation for loss of business, though no claim was made on that score in the complaint, and there was no showing of loss of business up to the time of the arrest on the warrant, and no direction was given to the jury to guard against danger of their duplicating damages for loss of business in assessing damages in the two causes of action.

Error is also assigned, in that the court submitted the cause of action for false imprisonment for an assessment of damages to cover expense of defending in the criminal proceeding, in connection with the arrest, notwithstanding there was no claim in the complaint for such recovery, and no evidence of expense except subsequent to arrest on the criminal warrant, thus again leading to duplication of damages by allowing a recovery for expenses where none were claimed, or shown, and also for expenses where there was no basis therefor if respondent was entitled to recover at all.

Error is further assigned, in that the court submitted the

false imprisonment cause of action for an assessment of damages for anxiety of mind caused by the pending criminal charge, instead of caused by the false and illegal restraint, the latter only being applicable to the claim for false imprisonment, and the former to the claim for malicious prosecution.

Further error is assigned, in that the court by the charge permitted an allowance of damages under the false imprisonment charge for the whole period of detention, whereas nearly all of such period was after the arrest on the warrant, and again in that it permitted an allowance of damages under the claim for false imprisonment in several other particulars which were either applicable only to the claim for malicious prosecution, or were not limited by the instructions so as to guard against compensation being allowed for the same thing twice.

Thus we have stated a number of claimed infirmities in the court's instruction, which are of the same general character and need not be discussed in detail. In general, the assignments of error mentioned are all well taken. Evidently there was want of clear appreciation of the elements of damages which were proper only on the claim for false imprisonment, and those which were proper only on the claim for malicious prosecution, and the necessity for so presenting the case to the jury to prevent duplicating, which was very liable to occur under the circumstances, and which evidently did occur. That is shown by the fact that, notwithstanding respondent was under false restraint but an hour at most, and without any circumstances of aggravation, he was awarded compensatory damages to the extent of $5,500, which the court was constrained to believe was too much by at least $4,500. The legitimate damages for the false detention of, probably, only part of an hour, merely time enough for Layer to consult with the public prosecutor and papers for the arrest to be obtained and served, were within a very nar-

row compass. Evidently the case was so submitted to the jury as to lead them to allow damages on the claim for false imprisonment which fell within the field covered by the claim for malicious prosecution, and then to allow the same over again.

The court committed further plain error by instructing the jury that if they concluded the conduct of defendant, by its agent, to have been malicious, they were not only permitted, but it was their duty, to award punitory as well as compensatory damages to respondent. Punitory damages are never allowable, in such a case, as matter of right. Regret has been expressed here that the law allowing such damages, at all, was incorporated into our jurisprudence. *Bass v. C. & N. W. R. Co.* 42 Wis. 654. There are indications that the court has been, at times, so disposed that, could the matter have been dealt with from an original standpoint, damages in civil actions would now be confined to those of a compensatory nature. *Eviston v. Cramer,* 57 Wis. 570, 15 N. W. 760; *Templeton v. Graves,* 59 Wis. 95, 17 N. W. 672. But the court has uniformly held that punitory damages are not allowable at all without the element of malice, and then not as a matter of right or out of any consideration for the plaintiff, but as a disciplinary punishment of the defendant, and admonishment to others to abstain from like bad conduct. A case should not be submitted for an award of such damages, at all, in the absence of evidence warranting a conclusion to a reasonable certainty that the defendant acted with bad intent of some sort (*Reed v. Keith,* 99 Wis. 672, 75 N. W. 392), and then only for the jury to allow or not allow such damages in their sound discretion in view of all the circumstances. That is deemed to be too elementary to require citation of authority.

True, in quite an early case, *Hooker v. Newton,* 24 Wis. 292, this court, on the strength of some few not very reliable or logically reasoned cases, held that it was proper to instruct

the jury in the obligatory form, as was done here. But such holding has not been followed. It is out of harmony with authorities in general and was, upon a full discussion of the matter, overruled in *Robinson v. Superior R. T. R. Co.* 94 Wis. 345, 68 N. W. 961. It was there distinctively held that punitory damages are not allowable as matter of legal right; that in all cases the court should decide whether, in any reasonable view of the evidence, punitory damages would be proper and, if so, to then instruct the jury what elements of fact are requisite to justify such damages and make it plain that whether to allow them or not is left to their sound discretion. To the same effect is *Tilton v. J. L. Gates L. Co.* 140 Wis. 197, 210, 121 N. W. 331.

The instruction was also erroneous because punitory damages are never to be visited upon a corporation for the wrongful conduct of its officers or agents in the absence of satisfactory proof of authorization of the particular act or ratification of it. *Robinson v. Superior R. T. R. Co.* 94 Wis. 345, 68 N. W. 961; *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276. That evidently was not appreciated by the circuit judge. Here there was no proof of such authorization. There was proof of mere abuse of authority which could not have been apprehended would occur when the corporate agents were placed in authority. However, there was conclusive evidence, as it seems, of ratification of the imprisonment after it occurred, so failure of the court to guard instruction in that respect was harmless.

Further assignment of error is made because the court failed to change the jury's finding convicting appellant upon the ground that its agent, when he detained respondent, did not honestly believe the latter to be guilty of having stolen the meat, and further in refusing to change the answer to the fourth question wherein the jury found that the agent acted in bad faith in detaining respondent and taking him to the police station. Both of these questions were evidently sub-

mitted to the jury on the theory that the defendant's agent is presumed to have known that the facts relied upon to charge respondent with having stolen the meat did not justify such charge; that the mere mistake of law, which was followed by a similar mistake of the public prosecutor and further dignified by mistake of the trial court, and only corrected by a decision here as involving a question of considerable difficulty, is a legitimate basis for holding that appellant's agents knew respondent was not guilty of larceny when he was treated as if he were guilty. That they had no such knowledge, in fact, is quite apparent. Therefore, our treatment of the first assignment of error condemns the rulings complained of.

So long as appellant's agents honestly supposed that the facts believed by them, and thereafter judicially found, to exist, and detained the accused, momentarily, with the purpose of immediately presenting the matter to the public prosecutor, and acting upon his advice, they cannot be held to have acted maliciously and dishonestly on the faith of the legal fiction, good in its place, that all men are presumed to know the law.

While it is often said that the presumption is, that every one knows the law, that is, in some respects, a legal relic. It is, in its broad sense, obsolete. It is so said, in effect, in all modern text-books, based on judicial authority. Lawson on Law of Presumptive Evidence at page 6 illustrates by quoting the language of an eminent judge that:

"There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so. . . . If everybody knew the law, there would be no need of courts of appeal, whose existence shows that judges may be ignorant of law."

The legal presumption however exists, and is applicable wherever necessary to the due administration of justice. *Ignorantia legis neminem excusat,* is a rule of necessity and

is limited in its scope by the reason of it. Such reason is that otherwise mere ignorance in fact of the law would furnish immunity from punishment for violation of the criminal code and immunity from liability for actual loss for violations of personal and property rights. The necessity does not go further in civil matters so as to punish, punitively, on the strength of the legal presumption, which more often than otherwise is against the truth. It does not prevail against the real truth of the matter on the subject of reasonable belief, which is the gist of probable cause discussed in the forepart of this opinion. To apply it literally to all situations would, as said in *Brent v. State,* 43 Ala. 297, "take from the rule all its virtue, and make it odious to all right and just thinking men."

The foregoing renders it unnecessary to discuss any of the other errors assigned. Most of those not specially mentioned appertain to the claim for malicious prosecution which will not be again presented for adjudication. Therefore, judicial guidance for a new trial in that respect is not required.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss it as to the claim for malicious prosecution, and for a new trial as to the claim for false imprisonment.

TIMLIN, J., dissents.

McINTOSH, Appellant, vs. BOWERS and wife, Respondents.

April 26—May 24, 1910.

Courts: Holding county court in another county: Judges disqualified by interest: Consent: Void orders: Collateral attack: Appeal: Matters considered: Judgment in another case: Possession of land: Notice of rights: Mortgages.

1. Proceedings in the county court of one county, conducted entirely in another county, are invalid.
2. Orders made in violation of sec. 2579, Stats. (1898)—providing that a judge of a court of record who is interested in an action or proceeding shall not have power to hear and determine the same or to make any order therein, except with the consent of the parties,—are absolutely void and hence subject to collateral attack.
3. As to the interests of minor parties in such a case there could be no consent to the making of an order by a disqualified judge.
4. A judgment declaring void certain proceedings could not be considered on an appeal from an earlier judgment rendered in an earlier action in which, though the same proceedings were involved, their invalidity did not appear.
5. Actual possession of land by one claiming under a land contract is notice of his rights to one obtaining a conveyance from the heirs of the vendor in such contract, and to one taking a mortgage executed jointly by such grantee of the heirs and by a holder of tax deeds of the land; and the mortgage is subject to those rights.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action by mortgagee to quiet title to a forty-acre tract of land in Vilas county. Defense, ownership in fee. The plaintiff's mortgage was executed October 25, 1904, by Kate Pier and E. G. Comstock jointly to secure a promissory note given to the plaintiff by Kate Pier. Kate Pier's title consisted of three tax deeds issued to her by Oneida county May 16, 1891, May 23, 1892, and September 29, 1893, respectively. E. G. Comstock's title consisted of a deed executed October 24, 1904, by Hattie P. Kathan, as special

guardian of Eleanor Kathan and others, minor children of Joseph E. Kathan, deceased, who obtained title to the premises from the state in 1884. This deed was executed in the course of proceedings taken in the circuit court for Vilas county, under sec. 3503 *et seq.*, Stats. (1898), in October, 1904, for the sale of this and twenty-one other tracts of land in Vilas county, in which the minor heirs of Joseph E. Kathan had some interest.

Neither Kate Pier nor E. G. Comstock had ever had possession of the land in question. The plaintiff claimed and introduced evidence tending to prove that it had always been unoccupied land, but defendant claimed that he had occupied it since 1891 by cutting wood thereon annually and raising potatoes upon a part thereof, and by maintaining a building thereon since 1892 which he occupied while cutting timber and cultivating the land. Defendant further claimed that he purchased the land for $150 from Kathan in 1892 and that his occupation was under claim of title, but that he obtained only a contract from Kathan, and in March, 1904, after Kathan's death, the land with other lands was sold in the course of proceedings in the county court of Vilas county under said sec. 3503 *et seq.*, Stats. (1898), to one D. H. George, who deeded the same to the defendant in June, 1904.

The circuit court found the facts in accordance with the defendants' contentions and dismissed the complaint, and the plaintiff appeals.

The cause was submitted for the appellant on the brief of *C. H. Van Alstine,* and for the respondents on that of *Wallrich, Dillett & Larson.*

WINSLOW, C. J. The trial court held that Kate Pier's tax deeds were invalid because the evidence showed that the defendant, *Bowers,* had actual possession of the land during the three years after the issuance of each of her tax deeds

and hence her title was barred by limitation. We are urged to reverse the court's finding as to *Bowers's* possession, but find ourselves unable to say that it is against the clear preponderance of the evidence. The trial court also held that Comstock's title was invalid because by the proceedings in the county court of Viles county in the spring of 1904 the Kathan title was conveyed to George and by him to *Bowers* in June following, thus leaving no title to pass under the circuit court proceedings which took place in October, 1904. This holding we consider erroneous. The evidence is undisputed that these proceedings were conducted before Judge COLMAN, county judge of Vilas county, entirely in Shawano county from beginning to end, and, further, that Judge COLMAN was interested as a stockholder in a brick company which it was agreed should receive, and did in fact receive, from George (the purchaser) the title to one tract of the lands sold.

The county court is required by law to be held at the county seat, except in the case of county courts possessing civil jurisdiction. Sec. 2440, Stats. (1898). We know of no authority, however, for holding any county court outside of the county. Were it to be admitted that this objection could not be raised collaterally, still the fact that the county judge was pecuniarily interested in the proceeding would be fatal. Our statute wisely provides that a judge of a court of record who is interested in any action or proceeding "shall not have power" to hear and determine the action or proceeding, or make any order therein, except by consent of the parties. Sec. 2579, Stats. (1898). There was no consent here, and could be none as to the interests of the minors. This statute deprives the judge of power, and orders made in violation of it are not only irregular but absolutely void, and hence subject to collateral attack. *Case v. Hoffman,* 100 Wis. 314, on page 356, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; 1 Freeman, Judgments (4th ed.) § 146; *Horton v.*

Howard, 79 Mich. 642, 44 N. W. 1112. So the proceedings by which the land in question was deeded to Comstock in October appear to be valid so far as the evidence in this action discloses; but the respondent attacks them now by saying that they are the same proceedings which were attacked and declared void in the case of *Kathan v. Comstock,* 140 Wis. 427, 122 N. W. 1044, which was an action brought by the Kathan heirs against Comstock, Kate Pier, and the plaintiff, *McIntosh,* for the express purpose of setting aside and vacating said proceedings and the deed to Comstock based thereon.

This seems to be true, but the difficulty is that the last-named action was not brought until after the present action, and the judgment therein was not rendered until after judgment in the present action; hence that judgment was not pleaded nor was it capable of being considered in the present action. It is equally plain that we cannot consider it upon this appeal.

Inasmuch, however, as it is settled in the case that *Bowers* was in possession, claiming title under a land contract from Kathan, when Comstock obtained his title as well as when the Pier tax deeds were executed, Comstock took the title and *McIntosh* the mortgage charged with notice of *Bowers's* rights under his purchase, and the mortgage would be subject to those rights. *First Nat. Bank v. Chafee,* 98 Wis. 42, 73 N. W. 318.

So while there must be a reversal upon the pleadings and facts shown by the evidence in this case, no judgment can be ordered, but the case must be sent back for completion of the trial. If there be no application for leave to plead the judgment in the other case by way of supplemental answer, then the only question upon which evidence will be necessary or allowable will be the question of the defendant *Bowers's* interest under his contract of purchase at the time of the Comstock deed. If he had fully paid the purchase price and was entitled to his deed the mortgage could have no effect, but if

there was a part of the purchase money still unpaid the mortgage would attach to that interest.

If there be application to plead the judgment in the other action by supplemental answer, the question whether such plea shall be allowed or not will rest in the sound discretion of the trial court. As the question whether such a plea should be now permitted and the question of the effect of such a plea, if allowed, have neither of them been presented to this court, we indicate no opinion upon them.

By the Court.—Judgment reversed, and action remanded for further proceedings according to law.

TIMLIN and BARNES, JJ., took no part.

CAPELLE, Respondent, vs. ROYAL INSURANCE COMPANY OF LIVERPOOL and others, Appellants.

April 26—May 24, 1910.

Fire insurance: Evidence of previous fire.

In an action upon an insurance policy for the amount of a loss sustained by fire, where no fraud in the causation of the fire was charged, evidence that plaintiff had suffered a fire of small amount about a year prior to the one in question was properly excluded.

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

A consolidated action against six insurance companies for the appraised amount of partial loss by fire. Evidence tended to show that plaintiff, with aid of his family, owned and ran a general store at Algoma with a stock approximating $7,000; that during the night of the 12th of September, 1908, a small fire occurred in the store, which, with the

devastating aid of the local fire department, caused a complete destruction in value of over $1,600 worth of stock, and damage to the remaining goods to the amount of nearly $900. Plaintiff at first gave notice of the fire asserting loss to the amount of $5,000. Pretty immediately thereafter he shoveled into the stove an amount of what he describes as dirt and ashes containing unidentifiable scraps of cloth, the remnants of burned clothing. After the arrival of the companies' adjusters and their inspection of the premises, and after their command and direction to clean up his store, he placed a considerable amount of merchandise, the value of which was entirely destroyed, in boxes and stored it in the cellar, of which fact the companies' adjusters had knowledge. He made proofs of loss asserting the amount of property totally destroyed in value at between $1,600 and $1,700, and damage to the rest at $1,800 or $1,900. Thereafter, and after sixty days from the fire, and before any demand for an appraisement, he advertised and made a considerable fire sale, including much of the damaged goods as well as the undamaged. On the 20th of November the defendants demanded appraisement and nominated an appraiser, and the plaintiff nominated one Hagarty as his appraiser, with whom he had no other relations than a business intimacy and friendship resulting from purchases of goods from him as a traveling salesman. The appraisers met on December 5th, and, after some difficulty, selected one Wilbur as umpire. They then, on December 7th, commenced their appraisal. They appear to have substantially agreed on the amount of totally destroyed property in accordance with the proofs of loss, since there was no means except the sworn statement of the plaintiff to ascertain either the amount or values of such goods. When they approached the question of allowance for partial loss they found that the plaintiff had separated damaged goods into three classes: First, that on which the damages amounted to seventy-five per cent. of the full value; second,

a class of fifty per cent. damages; and third, a class of twenty-five per cent. damages. They appear not to have seriously disagreed with plaintiff's estimate of the percentage of damage, but on counting or measuring up goods of a certain description upon which seventy-five per cent. damages were claimed they found less goods than claimed in the proofs of loss. This was explained by the fact that portions of such goods had after the making of the proofs of loss been sold at the fire sale. The defendants' appraiser then took the position that the seventy-five per cent. of the damage could be computed only upon the goods remaining on hand and in sight. Hagarty, the plaintiff's appraiser, insisted that, in the absence of any evidence to the contrary, the plaintiff's oath as to the quantity of those goods which existed after the fire was competent and sufficient evidence. On this division of opinion the umpire decided with Hagarty. Substantially throughout the subsequent attempts at appraisal this difference of opinion persisted, and the umpire's vote was cast in favor of accepting the sworn testimony of the plaintiff as sufficient to establish the amount of goods upon which the percentage of damage had been done. This led to certain other disputes as to how far it was necessary to measure or count the goods in the store, upon nearly all of which questions the umpire, being called in, agreed with Hagarty. The appraisal was made in accordance with that method, but evidently differed from the proofs of loss, being some $1,000 or $1,200 less. The places of variation are not disclosed by the evidence. After the appraisers had spent a day examining the damaged stock, a request or demand was made upon them by one of the adjusters to suspend, for the reason that the companies were going to examine the plaintiff under the policy and they wanted the appraisers to attend and listen to that examination. This Hagarty refused to do, as he was anxious to complete the appraisal of the damage and had no knowledge of the field of exploration intended by this hear-

ing. The hearing, by the way, was protracted from December 8th to the following April, and but a small part of it was addressed to the values or quantities of goods or amount of damage.

The defenses set up were (1) fraud in claiming too much by the proofs of loss; (2) that Hagarty was not competent and disinterested, but was partisan; (3) that he acted improperly as appraiser in accepting the plaintiff's sworn statement and declining to properly investigate loss, quantities, or values, and in refusing to hear evidence offered by the defendants to the appraisers with reference thereto; (4) that plaintiff fraudulently altered his inventory of the year before so as as to mislead the appraisers; (5) that he fraudulently sold and disposed of goods for the purpose of making appearance of greater loss and fraudulently refused information to the appraisers; (6) that he fraudulently concealed in his basement certain goods and represented the same to have been totally destroyed. The jury by special verdict found that plaintiff did not knowingly make any false entries as to quantity or value of insured goods either in his inventory of January, 1906, or in the proofs of loss; that he had no fraudulent intent to conceal the goods stored in the basement; that he did not represent that all the goods on which a total loss was claimed were burned to ashes; that in making sales he had no fraudulent intent; that the value of the goods stored in the basement was wholly destroyed by the fire; that the $2,541.17 awarded by the appraisers did not exceed the actual loss caused by the fire; that Hagarty did not intentionally act unfairly toward the defendants, or with partiality toward the plaintiff, in performing his duty as appraiser; and that Hagarty did refuse to suspend proceedings on the appraisal in order to attend upon the examination of the plaintiff by the attorneys for the companies. No other findings appear to have been requested. Defendants filed motions for judgment on the uncontradicted evidence not-

withstanding the verdict, or, in lieu, for a new trial. Plaintiff made motion for judgment upon the verdict. Whereupon judgment was entered in plaintiff's favor for the amount of the award, from which the defendants appeal.

For the appellants there was a brief by *Wigman, Martin & Martin, O'Meara & O'Meara, Humphrey Pierce,* and *Francis S. Bradford,* and oral argument by *J. F. Martin.*

For the respondent there was a brief by *Minahan & Minahan* and *M. T. Parker,* and oral argument by *V. I. Minahan.*

DODGE, J. With one exception, the whole of appellants' assignments of error and brief are devoted to asserting and arguing the fatal effect upon plaintiff's recovery of various alleged acts and circumstances, such as fraud in making and proving his claim, destruction of certain remnants of burned goods, concealment from both appraisers and adjusters of certain other goods claimed to have been entirely destroyed in value, disposal of goods by sale before the appraisal, partisan and unfair character of the appraiser selected by plaintiff, and arbitrary and partial action of the appraisers in performing their service. Some of these legal contentions are undoubtedly sound in the abstract, others perhaps more doubtful. But there exists no necessity to discuss or decide upon them in this case, for the reason that none of the facts upon which they are predicated are proved without conflict, and all of them are negatived either by express finding of the jury in the special verdict, or, so far as they are material and in issue, by a finding in favor of the plaintiff impliedly made by the court pursuant to sec. 2858*m*, Stats. (ch. 346, Laws of 1907). For such findings, whether by the jury or court, we find at least so much support in the evidence that we cannot reverse them on appeal under the well-established rules as to the conclusiveness of decisions on fact by the trial court.

The one detailed assignment of error is upon excluding evidence that plaintiff suffered a fire of small amount about a

year previous to the one involved in this action. We can find no issue in the pleadings to which such evidence could have been relevant. There is no charge of fraud in causation of the fire, and the evidence against the same is so clear and definite that the admission of this remote fact, we are clear, could not have had any effect upon the jury. We think the court rightly ruled that it was immaterial and irrelevant, and we find no error in the record.

By the Court.—Judgment affirmed.

STATE EX REL. SCHUETTE, Respondent, vs. CARY, State Superintendent, Appellant.

April 26—May 24, 1910.

Schools: Appeals to state superintendent: Time for decision: Mandatory statute: When hearing is "closed:" Rules of procedure: Certiorari: ***Questions raised.***

1. Sec. 497, Stats. (1898)—providing that on appeals to the state superintendent he shall make and file his decision within thirty days after the hearing thereof is closed; that the decision appealed from shall be operative until reversed; and that no decision made by the state superintendent after the lapse of such thirty days shall be effectual,—is mandatory, and a decision made after the time therein limited is of no effect.
2. Where no rule prescribed by the state superintendent under the authority given by sec. 497, Stats. (1898), declares when the hearing of an appeal shall be deemed closed, it will be deemed to have been closed when the last step was taken by the parties for submitting the controversy to him. Such last step in this case consisted of the filing of an answer to the petition of the appellants.
3. In reviewing upon *certiorari* the proceedings before the state superintendent on an appeal, pursuant to sec. 497, Stats. (1898), from the decision of a town board, the question of the town board's jurisdiction cannot be inquired into, because the superintendent has no power or authority under said section to determine that question.

4. The rules of procedure prescribed by the state superintendent for the hearing of appeals under sec. 497, Stats. (1898), should provide that the papers, files, and records in the proceedings of the school district or town board be submitted to him, to enable him to ascertain whether he should entertain the appeal on its merits.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

On August 3, 1907, the supervisors of the town of Centerville, Manitowoc county, made an order dividing school district No. 1 of that town and creating a new district. At the same time they made an order directing the clerk of district No. 1 to collect $192.35 in taxes and to pay this, together with $180.40 of the tax levied at the preceding annual school meeting, to the new district. Sec. 497, Stats. (1898), makes provision for appeals to the state superintendent from decisions of school district meetings or town boards which affect school districts, and such appeals "shall be taken and heard in the manner prescribed by him." The state superintendent has formulated "Rules Respecting Appeals" under the provisions of this section. The portions of these rules material to the instant case are as follows:

"1. An appeal must be in writing, addressed to the state superintendent, and signed by the appellant, but no particular form of statement is necessary.

"2. The appeal should be as brief as is consistent with a complete statement of the case. It should set forth the action or proceedings appealed from, and the reasons why such action should be set aside. . . . If the appeal relates to the formation or alteration of a district, a map or plat of the district or districts affected by the order from which the appeal is taken, showing the boundaries, location of the schoolhouses, and the situation of the marshes, rivers, and bridges of the territory in question, should be presented with and made a part of the appeal. A statement showing the assessed valuation of the district or districts, or of the several parts of a district divided, and the number of children over four and under twenty years of age residing in each, should accompany

the map, and form a part of the papers in the case. When the papers are completed they should be fastened together, numbered or lettered for reference, and an affidavit attached setting forth that the statements therein made are true, and that the map, list of children, and valuation of property are correct. . . .

"4. An appeal should be taken within thirty days from the performance of the act appealed from, or within thirty days after the action complained of has come to the knowledge of the appellant.

"The Answer.

"1. The appellee has fifteen days in which to prepare his answer, and all the directions above given in reference to the preparation and service of a copy of the appeal papers should be complied with in preparing and serving the answer upon the appellant, before it is forwarded to the state superintendent. . . .

"Replication or Rejoinder.

"A replication or rejoinder will be allowed, upon proof that new facts have come to the knowledge of the party wishing the rejoinder since the appeal or answer was submitted to the state superintendent, or that there are material errors in the statement of the other party.

"General Remarks.

. . . . . .

"If the appeal is not taken or the answer or rejoinder made within the prescribed time, the reasons for the delay must be given."

On August 22, 1907, Adolph Grotegut and other residents of school district No. 1, town of Centerville, Manitowoc county, appealed to the state superintendent from the orders of the town board of August 3, 1907, making a division of the existing school district and assessing the interest of the new district in the property of the old district. The appeal petition set forth the making of the orders, presented a map of the territory affected, described it, gave the facts as to the assessed value of the old and the new districts, the number of children of school age in the districts, the location of the

old school as regards accessibility by the children, the probable attendance at each of the schools in the new districts, and the facts that the old school grounds, although lying in the new district, are assigned to the old district, and that the school grounds for the new district are located only a quarter of a mile from the old school grounds. They asked that the orders of the town board be reversed and annulled. On August 30, 1907, an answer to the petition was filed with the state superintendent. Additional facts are set forth in it, and the signers pray for confirmation of the orders of the town board. No other papers were filed with the state superintendent, no other hearing was had, and no order was made by him or further steps taken until July 2, 1908, when he made a decision on the appeal, wherein he adverted to the fact that it did not appear that the orders of the town board were properly served, but upon review of the facts before him he reversed the orders of the town board on the merits of the petition. On August 1, 1908, a writ of *certiorari* from the circuit court for Manitowoc county for a review of the decision of the state superintendent was served upon him. The petition for the writ alleges that the decision of the superintendent is void: (1) Because he did not prescribe the manner in which such appeal should be taken and heard; (2) because no hearing relative to the merits of the appeal was had by or before the superintendent; (3) because the decision was not made and filed within "thirty days after the hearing of such appeal was closed, as required by sec. 497, Stats. (1898)." In his return to the writ the superintendent certifies that the appeal petition, the answer, and his decisions are all the papers which he had had before him as superintendent in relation to the appeal and his decision thereon, that no evidence was taken before him, and that he made his decision solely on the appeal petition and answer. The circuit court reversed the decision of the superintendent on the ground that the hearing before the superintendent had closed

within a reasonable time after the filing of the answer to the appeal petition, which was more than thirty days before the date of the superintendent's decision, and that the superintendent's decision was not made within thirty days after the hearing on the appeal was closed. This is an appeal from the judgment of the circuit court.

For the appellant there was a brief by *Schmitz & Groelle,* and oral argument by *F. F. Groelle.*

For the respondent there was a brief by *Voigt & Voigt,* and oral argument by *Edward Voigt.*

SIEBECKER, J. Sec. 497, Stats. (1898), provides:

"Any person conceiving himself aggrieved by any decision made by any school district meeting or by any town board in forming or altering or in refusing to form or alter any school district, or by any other thing done by any officer or board under the provisions of this chapter, may appeal to the state superintendent. Such appeals shall be taken and heard in the manner prescribed by him and he shall make and file his decision within thirty days after the hearing thereof is closed. The decision appealed from shall be operative until the same shall be reversed; and no decision on appeal to said superintendent made by him after the lapse of thirty days from the time the hearing thereof is closed shall be effectual."

The trial court held that the superintendent's decision annulling the order of the town board was not made within thirty days from the time the hearing on the appeal before him closed, and was therefore ineffectual. The appellant assails this holding of the trial court upon the grounds that the statutory provision, to the effect that the superintendent "shall make and file his decision within thirty days after the hearing thereof is closed," is merely directory, and further, that, if it be a mandatory provision, the face of the record fails to show that the superintendent's decision was not made within this thirty-day period. We cannot hold this provision of the statutes directory, in view of the legislative declara-

tion that the town board's decision shall be operative until reversed by the superintendent, and that no decision by the superintendent shall be effectual if made after the lapse of thirty days from the time the hearing of the appeal closed. This shows a clear legislative intent that it shall be imperative on the superintendent to make his decision within thirty days after the closing of the hearing before him. This legislative action leaves no room for a claim that the legislature contemplated that a decision might be rendered after the thirty-day period rather than that no decision should be made. On the contrary, the clear inference is that they intended to negative this by expressly providing that, if the decision should not be made within the prescribed time, then no effectual decision could be made. These conditions and provisions make the statute mandatory in terms. *State ex rel. Cothren v. Lean,* 9 Wis. 279; *State ex rel. O'Neill v. Trask,* 135 Wis. 333, 115 N. W. 823.

The contention that the decision was made within the thirty-day period after the hearing on appeal before the superintendent had closed is based on the grounds that under the rules of procedure prescribed by the superintendent for the prosecution of these appeals there is no provision declaring when the hearing thereof shall be deemed closed, and that the superintendent at no time declared it closed before he made his decision. These rules of procedure contain no provision expressly declaring when a hearing shall be deemed closed within the purview of the statute fixing the time for him to render his decision thereon. The statute provides that appeals shall be heard in the manner prescribed by him. This hearing manifestly embraces the steps taken and the acts done by the parties to the appeal in presenting to him the action of the town board, together with the facts and law relevant to the controversy. The hearing then must be closed when the last step has been taken by the parties for submitting the controversy to the superintendent. We must there-

fore look into the record to determine what was the last thing done in presenting this appeal to the superintendent. In the instant proceeding it consisted in the filing of the answer on August 30, 1907. Nothing was done thereafter by any of the parties to this proceeding. This act, therefore, operated to close the hearing on appeal before the superintendent, and all that remained was the rendition of his decision, which was made on July 2, 1908. This was ten months after the hearing had thus been closed, and long after the time had expired within which the statutes empower him to make an effectual decision in the matter. It was therefore wholly ineffectual, and left the town board's order in force. The trial court properly held that the superintendent's decision reversing the action of the town board was null and void.

It is furthermore urged that the trial court should have sustained the superintendent's decision reversing the town board's orders, because the record fails to show that the town board obtained jurisdiction in the proceeding. It is averred that there is nothing to show that the board gave the clerk of the school district to be affected five days' notice in writing of the time and place of meeting for the consideration of the contemplated division of the district. See *State ex rel. Stengl v. Cary,* 132 Wis. 501, 506, 112 N. W. 428. An inspection of the record presented on appeal discloses that neither the original papers and files on which the town board acted, nor copies nor proof of them, were embraced in the appeal papers before the superintendent. It cannot be ascertained from the record whether or not this notice was given to the district clerk. In this condition of the proceeding no adjudication respecting the alleged irregularity could be had, were it a proper subject of inquiry on *certiorari* for review of the action of the superintendent. It is, however, obvious that, in reviewing the proceeding before the superintendent, the question of the town board's jurisdiction cannot be inquired into, because the superintendent has no power or au-

thority under sec. 497, Stats. (1898), to determine that question. The inquiry here can embrace only such questions as are involved in a determination as to whether the superintendent made an effectual decision within the power conferred on him. The field of his authority does not include a review by him of questions of a town board's jurisdiction to make the order appealed from. The trial court properly refused to consider and determine whether or not the town board had had jurisdiction in the matter.

We deem it appropriate to call attention to the fact that the rules of procedure prescribed by the state superintendent for the hearing of these appeals do not prescribe that the papers, files, and records in the proceedings of the school district or school board should be submitted with the appellant's statement, the appellee's answer, or in any other manner. It seems that these documents and records should be returned to enable him to ascertain whether he should entertain on its merits the appeal for a review of the order appealed from. He is without power to adjudicate upon the question of the regularity of the procedure before the board going to its jurisdiction, but he should look into the record of the proceedings to ascertain whether his powers for a review of the merits of the order appealed from can be legally invoked.

By the Court.—Judgment affirmed.

WILL OF KAVANAUGH: KAVANAUGH and others, Respondents, vs. WATT, Executor, Appellant.

April 26—May 24, 1910.

Wills: Superstitious uses: Masses: Public charities: Trusts: Certainty: Naming trustee: Equitable conversion: Perpetuities.

1. The doctrine of superstitious uses under the statute of 1 Edw. VI., c. 14, according to which devises for masses were held void, has never obtained in the United States, where there is absolute religious equality.

2. A gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons by bringing their hearts under the influence of education or religion, is a "charity."
3. Masses, as celebrated by the Roman Catholic church, being shown to be public services, not alone for the repose of the souls of deceased persons specifically named, but for the benefit of all mankind, are within the religious or pious uses which are upheld as public charities.
4. A bequest for masses is therefore a "charitable bequest," and valid as such, even though the masses be designated as for the repose of the souls of specified persons.
5. Sec. 2081, Stats. (1898), relating to trusts, does not apply to a charitable bequest, and the question whether such a bequest is sufficiently definite and certain must be determined, not with reference to what is required in regard to private trusts, but with reference to the liberal rules for judicial construction applicable to charitable trusts.
6. A charitable trust is not rendered invalid by indefiniteness as to beneficiaries, if the scheme of charity be sufficiently indicated or a method provided by which it may be ascertained and its objects made sufficiently certain to enable a court to enforce execution of the trust according to the scheme.
7. In charitable bequests no trustee need be named, as a charity will not be allowed to fail for want of a trustee. The person named in the will to execute the charity will be held to be the trustee and, if necessary that he hold the title for the purpose of carrying out the provisions of the will, he will by implication hold such title.
8. A testamentary gift for masses for the repose of the souls of certain persons including the testator, such masses to be "said according to the directions of" two persons named, who are appointed "to direct where and when to say said masses," is sufficiently definite and certain.
9. The fact that property given by will for a public charity consists wholly of real estate, and that no person is named as devisee thereof, does not invalidate the gift, sec. 2075, Stats. (1898), not being controlling in cases of public trusts, where indefiniteness is of the essence of the charity.
10. Where in such a case the terms of the will cannot be carried out without converting the real estate into personalty, equitable conversion results and the estate of the testator is to be treated as personalty.
11. Where, under the doctrine of equitable conversion, the property given by a will for a charity is to be treated as personalty, the

statute of perpetuities need not be considered, even if applicable to charitable bequests.

12. *McHugh v. McCole*, 97 Wis. 166, so far as it conflicts with the decision in this case, overruled.

TIMLIN, J., *dissenting*, is of the opinion (1) that, under sec. 18, art. I, Const., the state cannot, through its courts or legislature, compel, direct, or regulate the celebration of masses, and that where incapacity exists to enforce a charitable trust it is void; and (2) that if in this case there is no equitable conversion of the testator's estate, but the land is to be held in trust indefinitely and the rents and profits devoted to paying for masses, there would result a holding of the use of the land upon a tenure long ago obsolete, as well as forbidden by our state constitution, namely, the tenure of frankalmoign or divine service.

MARSHALL, J., *concurring*, is of the opinion (1) that in view of the full reintrenchment in our jurisprudence of the common-law doctrine of charities, begun in *Dodge v. Williams*, 46 Wis. 70, and completed by the enactment of ch. 511, Laws of 1905, resort to the doctrine of equitable conversion to sustain a devise for charity is no longer necessary; (2) that acceptance of a trust for masses is in the nature of a public contract, to the enforcement of which by the courts, through the attorney general, there can be no constitutional objection based on the right of immunity from interference in religious matters; (3) that secs. 2072, 2073, Stats. (1898), have nothing to do with charitable trusts, where the legal title is always in the trustees and the equitable interest in the beneficiaries; and (4) that the constitutional provision declaring all titles allodial and prohibiting feudal tenures, instead of suggesting incapacity to convey land to charitable uses, rather suggests absolute freedom in that regard.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This proceeding was brought in the county court to construe the will of James Kavanaugh, deceased, which is as follows:

"I, James Kavanaugh, of Maple Grove, Wisconsin, being of sound mind and memory and understanding but considering the uncertainties of human life, do make and declare this to be my last will and testament.

"First. After the payment of my just debts and funeral expenses, I give, devise and bequeath all the rest of my prop-

erty, both real estate and personal property, for masses for the repose of my father's and mother's and sister's and brother's and my own soul. The masses will be said according to the directions of *Thomas J. Fenlon* and *J. P. Watt*, of Maple Grove, Wis., and I hereby appoint them to direct where and when to say said masses. I hereby appoint *J. P. Watt* of Maple Grove, Wis., as executor of this my last will and testament.

"Signed and acknowledged this ninth day of March, 1908.

his
"JAMES X KAVANAUGH.
mark

"Signed and acknowledged by said testator in the presence of us who hereunto subscribe our names in the presence of said testator and of each other. JOHN E. MULLENS.
"M. J. KAVANAUGH."

The county court held that the provision in the will which provides that "after the payment of my just debts and funeral expenses, I give, devise and bequeath all the rest of my property, both real estate and personal property, for masses for the repose of my father's and mother's and sister's and brother's and my own soul," is wholly void and of no effect. On appeal the circuit court affirmed the judgment of the county court and entered judgment accordingly, from which this appeal was taken.

E. L. Kelley and *P. H. Martin*, for the appellant, cited, among other authorities, *Harrington v. Pier*, 105 Wis. 485; *Flood v. Ryan*, 220 Pa. St. 450, 69 Atl. 908, 22 L. R. A. N. S. 1262; *Hoeffer v. Clogan*, 171 Ill. 462, 40 L. R. A. 730; *Schouler, Petitioner*, 134 Mass. 426; *Rhymer's Appeal*, 93 Pa. St. 142, 39 Am. Rep. 736; *Harrison v. Brophy*, 59 Kan. 1, 40 L. R. A. 721; *Webster v. Sughrow*, 69 N. H. 380, 48 L. R. A. 100; *Moran v. Moran*, 104 Iowa, 216, 39 L. R. A. 204; *Sherman v. Baker*, 20 R. I. 446, 40 L. R. A. 717; *Hadley v. Forsee*, 203 Mo. 418, 14 L. R. A. N. S. 49, 96; *Coleman v. O'Leary's Ex'r*, 24 Ky. Law Rep. 1248, 70 S. W. 1068; *Hood v. Dorer*, 107 Wis. 149; *Kronshage v. Varrell*, 120 Wis. 161; *Dodge v. Williams*, 46 Wis. 70; *Webster v. Morris*, 66 Wis. 366; *Sawtelle v. Witham*, 94 Wis. 412.

For the respondents there was a brief by *Burke & Craite* and *Nash & Nash,* attorneys, and *J. S. Anderson,* of counsel, and oral argument by *R. W. Burke.* Upon the question of the validity of the bequest for masses, they cited *McHugh v. McCole,* 97 Wis. 166, 173; as to equitable conversion, *Eneberg v. Carter,* 98 Mo. 647, 14 Am. St. Rep. 664; *Fahnestock v. Fahnestock,* 152 Pa. St. 56, 34 Am. St. Rep. 623; *Crowley v. Hicks,* 72 Wis. 539; *Prichard v. Thompson,* 95 N. Y. 76; *Read v. Williams,* 125 N. Y. 560; and upon the rule *stare decisis, Pittelkow v. Milwaukee,* 94 Wis. 651; *Brader v. Brader,* 110 Wis. 423.

The following opinion was filed May 24, 1910:

KERWIN, J. The respondents, heirs at law, attack the will under consideration upon the grounds: (1) That it is void, independent of any statute, for uncertainty and indefiniteness; (2) that it attempts to create a private trust in violation of statute; and (3) that if it attempts to create a public trust it is nevertheless void because under the equity powers of the court it is too indefinite and uncertain to be enforced. On the part of the appellant it is insisted that the will is simple, the intent plain, and the purpose lawful; that it creates a public charity and as such is valid. Respondents rely mainly upon *McHugh v. McCole,* 97 Wis. 166, 72 N. W. 631. Starting with the proposition laid down in *McHugh v. McCole, supra,* that the trust was private and, therefore, too indefinite and uncertain to be enforced by a court of equity, the court easily reached the conclusion that the bequest for masses was void. No proof was made in the *McHugh Case* that the masses were not private in their nature and for the sole benefit of the souls of the giver and others specifically mentioned. No evidence was offered as to the nature of masses, whether public or private, and the court rested its opinion upon the idea that the trust was purely private. Had the court started with the proposition that a

bequest for masses is a public charity, a different conclusion, doubtless, would have been reached in the *McHugh Case.*

Counsel for respondents insist that the bequest violates sec. 2081, Stats. (1898). If, as was assumed in the *McHugh Case,* the trust were private, there would be much force in this contention, since under this section the trust must be fully expressed and clearly defined on the face of the instrument creating it. But this argument is based upon the proposition that the trust created in the case before us is a private trust, not a public charity. So we are brought to the question whether a bequest for masses is a public charity.

Bequests for religious purposes date very far back in judicial history. Some reference is made to them and cases collected in a quaint old book entitled "Law of Charitable Uses, Revised and Much Enlarged; with Many Cases in Law Both Ancient and Modern," printed in 1676 under the censorship of Francis North. At page 35 of this work is found a will dated January 17, 1524, from which we quote some of the "items."

"Item, I Will, after my decease, that A. my wife, have my House called C. during her natural Life, and she to keep up the reparations of said House, and the Lords Rent to pay, and she to find four Tapers of four pounds of Wax; that is, one before the Rude under the Rude Loft, and another before our Lady; another before St. Thomas, and one before St. Anthony.

"Item, I Will, That she keep mine Obit every year during her Life, and to have every year three Priests, and they to have Eight pence a piece, and two dozen of Bread, and a Kinderkin of double Beer, and two Cheeses, price of Twenty pence.

"Item, I Will, and appoint after my decease That all and singular my Evidences, and my Copies, that they be delivered into the custody of the Churchwardens of the Parish of Peter and Paul, of T. aforesaid.

"Item, I Will, That after the natural life of A. my wife, that them my House called C. with all the Appurtenances be-

longing thereunto, as is more plainly specified by my deeds; that it shall remain evermore unto the Church aforesaid; First, to keep mine Obit yearly, and the four Tapers of four pounds of Wax. Moreover, I Will, That after the decease of A. my wife, that the Churchwardens do buy six pounds of Wax, and make the common Light, and the Taper before the Rude, to the full of two pounds of Wax apiece, and so to continue for evermore; and the residue of the Rent to remain to the reparations of the Church aforesaid."

Also, on page 41, another will, dated July 1, 1523, by the terms of which there was given "several of her Lands to the use of the Priests Service, in the Church of St. Peter in Stowe-Market, to pray for her Soul, and the Souls of her Husbands and others, for 99 years and the Lands to be sold by her Co-Feoffees, and the one half of the Money to go to the making of the High-way, between Stowe and Ipswich; and the other to be divided, one part to a Priest, to say Prayers in the said Church of S. Peter, for her Soul, and the Souls of the afore-rehearsed. . . ."

The following authorities also relate to charitable bequests pertaining to religious purposes: *Baker v. Sutton,* 1 Keen, 224; *Felan v. Russell,* 4 Ir. Eq. 701; *Powerscourt v. Powerscourt,* 1 Molloy, 616; *Moggridge v. Thackwell,* 1 Ves. Jr. 464; *Phillips v. Aldridge,* 4 Term Rep. 264; Tyson, Charitable Bequests, ch. 10, p. 118; *In the Matter of Michael's Trust,* 28 Beav. 39; Tudor, Charities and Mortmain.

There is much conflict in the early and some in the late cases as to what is and what is not a public charity. Many of the bequests in England were held void as being to superstitious uses, but no such rule or principle obtains in this country; hence the decisions declaring gifts or bequests void as gifts to superstitious uses have no application here. *McHugh v. McCole,* 97 Wis. 166, 180, 72 N. W. 631. The doctrine of superstitious uses under the statute of 1 Edw. VI., c. 14, under which devises for masses were held void, has never obtained in the United States, where there is absolute

religious equality. *Webster v. Sughrow,* 69 N. H. 380, 45 Atl. 139, and cases cited.

Indeed, the question is not new in this state. In *McHugh v. McCole, supra,* it was held that, had the bequest been direct to a bishop or priest for masses for the repose of the souls of the persons named in the will, it would have been valid, but that the contested provisions of the will were void trusts and not valid personal bequests. No claim is made by appellant that the trust is private. The main questions for determination, therefore, are whether the bequest for masses is a public charity and sufficiently definite for enforcement by a court of equity. No proof was made in the *McHugh Case* that masses are public in their nature or for the benefit of mankind generally, and whether the court should have taken notice of this fact without proof we need not consider here, because in the case before us such proof was made. It was shown by competent evidence that the sacrifice of the mass is a public service, not alone for the repose of the souls of the deceased members mentioned, but for the benefit of all mankind, and so understood by all members of the Catholic church. So while the masses may be intended to benefit the souls of the departed mentioned, the benefits are public as well, therefore come within the designation of a public charity. Masses are religious observances and come within the religious or pious uses which are upheld as public charities. *Schouler, Petitioner,* 134 Mass. 426; *Rhymer's Appeal,* 93 Pa. St. 142; *Hoeffer v. Clogan,* 171 Ill. 462, 49 N. E. 527; *Webster v. Sughrow,* 69 N. H. 380, 45 Atl. 139; *Seda v. Huble,* 75 Iowa, 429, 39 N. W. 685; *Sherman v. Baker,* 20 R. I. 446, 40 Atl. 11. A gift to be applied consistently with existing laws for the benefit of an indefinite number of persons by bringing their hearts under the influence of education or religion is a charity. *Jackson v. Phillips,* 14 Allen, 539. In *Hoeffer v. Clogan, supra,* the bequest was of certain property "to sell the same and expend the proceeds

of said sale in saying masses for the repose of my soul and the souls of my deceased wife, Margaret Clogan, my mother-in-law, Ellen Hurley, and my brother-in-law, James Hurley." The bequest was held valid, and many cases are cited and discussed in the opinion. The tendency of the courts is to uphold charitable trusts in accordance with the intent of the donor and consistently with rules of law, and this court has asserted the doctrine in no uncertain terms in several cases. The question has been so exhaustively treated in *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, and *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345, that further discussion seems unnecessary.

According to the doctrine of the Catholic church as established by the proof in this case, the whole church profits by every mass, since the prayers of the mass include all of the faithful, living and dead. The sacrifice of the mass contemplates that all mankind shall participate in its benefits and fruit.

"The mass is the unbloody sacrifice of the cross, and the object for which it is offered up is in the first place, to honor and glorify God; secondly, to thank Him for His favors; third, to ask His blessing; fourth, to propitiate Him for the sins of all mankind. The individuals who participate in the fruits of this mass are the person or persons for whom the mass is offered, all of those who assist at the mass, the celebrant himself, and for all mankind, within or without the fold of the church."

So it seems clear upon reason and authority, under the doctrine of the Catholic church as established by the evidence in this case, that a bequest for masses is a charitable bequest, and valid as such, although the repose of the souls of particular persons be mentioned.

But it is said that the present bequest is too indefinite and uncertain to be enforceable and is void under the statutes of this state and independent of any statute. The contention that the will is void for uncertainty independent of any statute

is without foundation under the authorities. The fundamental principle to observe in the construction of wills is to seek out the intention of the testator. This rule has been so often stated by this court that citation of authority is unnecessary. The intention of the testator in this case is plain from the terms of the will, namely, that his property be applied, first, to the payment of his debts, and the residue devoted by *Fenlon* and *Watt* to the celebration of masses. The bequest for masses being, as we have seen, a charitable bequest and for the benefit of mankind in general, the statute relating to trusts (sec. 2081) does not apply. *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345. It is true, as stated by this court in *Webster v. Morris,* 66 Wis. 366, 28 N. W. 353, and again in *Harrington v. Pier, supra,* that some degree of certainty must be observed in charitable bequests.

"The scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained, and its object made sufficiently certain to enable the court to enforce the execution of the trust according to such scheme and for such object. It must be of such a tangible nature that the court can deal with it. The mere direction to expend money for charitable purposes at large is too indefinite to be carried into execution." [66 Wis. 391; 105 Wis. 508.]

The certainty must be determined, not with reference to sec. 2081, Stats. (1898), or that which is required in regard to private trusts, "but with reference to those liberal rules for judicial construction applicable to charitable trusts." *Harrington v. Pier, supra.*

Counsel also contend that, since the estate of the testator consisted principally of real estate, and the will not providing for a disposition of the lands to any one, it is void. But this contention brings us again to the distinction between a private trust and a public or charitable bequest. In the former, statutory certainty is required, while in the latter it is not. The certainty of beneficiaries in cases of private trusts does not

obtain in cases of public trusts. And this is necessarily so from the nature of public trusts as distinguished from private trusts. This subject has been fully covered in *Harrington v. Pier, supra.* At page 514 of 105 Wis. (82 N. W. 355) the court said:

"It follows that indefiniteness of beneficiaries who can invoke judicial authority to enforce the trust, want of a trustee if there be a trust in fact, or indefiniteness in details of the particular purpose declared, the general limits being reasonably ascertainable, or indefiniteness of mode of carrying out the particular purpose, does not militate against the validity of a trust for charitable uses. Given a trust, with or without a trustee, a particular purpose—as education, or relief of the poor, as distinguished from a bequest to charity generally,—and a class great or small, and without regard to location, necessarily, as 'worthy indigent females,' or 'indigent young men studying for the ministry,' or 'resident poor,' or 'indigent children of Rock county,' or 'the boys and girls of California' (*People ex rel. Ellert v. Cogswell,* 113 Cal. 129, 45 Pac. 270), and we have a good trust for charitable uses. The court, through its strictly judicial power, may fill the office of trustee if necessary, the trustee can select the immediate beneficiaries or objects within the designated class and scheme; he can determine upon the details necessary to effect the intention of the donor within the general limits of his declared purpose, and execute the trust accordingly; and the proper public agencies, if necessary, can invoke judicial power to enforce such execution."

Sec. 2075, Stats. (1898), which provides that "Every disposition of lands, whether by deed or devise, hereafter made, except as otherwise provided in these statutes, shall be directly to the person in whom the right to the possession and the profits shall be intended to be vested, and not to any other, to the use of or in trust for such person, and if made to one or more persons in trust for or to the use of another no estate or interest, legal or equitable, shall vest in the trustee," is also relied upon by respondents as rendering the will void. But this statute is not controlling in cases of public trusts where

indefiniteness is of the essence of the charity; nor is it controlling in this case, because the will created an equitable conversion, and the estate of the testator must be treated as personal property. The terms of the will could not be carried out without converting the real estate into personalty. The evidence shows that the estate left amounted to about $6,000, consisting of real and personal property. The real estate was mortgaged for $1,200 or $1,500. The debts allowed by the county court amounted to about $917. The amount of money left was $400, and the personal estate was insufficient to pay the debts. So it is apparent that conversion of the real estate was necessary to carry out the terms of the will. Consequently the doctrine of equitable conversion applies. *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *In re Albiston's Estate,* 117 Wis. 272, 94 N. W. 169; *Holmes v. Walter,* 118 Wis. 409, 422, 95 N. W. 380.

In *Harrington v. Pier,* 105 Wis. 485, at page 492 (82 N. W. 345, 347), quoting from *Given v. Hilton,* 95 U. S. 591, this court said:

"The blending of real estate and personal property in one fund for all the purposes of the will is generally regarded as evidencing intent that the whole estate shall be treated as personal property, even though a necessity therefor does not exist; but such evidence is not conclusive on the question."

It seems clear that the testator intended an equitable conversion. The main question in the case before us, therefore, is whether a bequest for masses is a charitable bequest, and, this being determined in the affirmative, we easily reach the conclusion that the will is valid. In *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, and *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345, it is determined, after an exhaustive review of the authorities, that chancery had jurisdiction over public trusts or charities in England before the statute of 43 Elizabeth, c. 4, and such chancery jurisdiction be-

came a part of our jurisprudence, and, therefore, charitable trusts may be enforced and are not controlled by our statutes of uses and trusts. In the nature of things this was held necessary, because a public trust or charitable use is necessarily indefinite and uncertain, especially as to beneficiaries; that a public trust begins where a private trust ends as regards certainty and definiteness. Of course some degree of certainty must obtain even in a public trust. The scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained and its objects made sufficiently certain to enable the court to enforce an execution of the trust according to the scheme. *Webster v. Morris,* 66 Wis. 366, 28 N. W. 353; *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345. In charitable bequests no trustee need be named, as a charity will not be allowed to fail for want of a trustee. The person named in the will to execute the charity will be held to be the trustee, and, if necessary that he hold the title for the purpose of carrying out the provisions of the will, he will by implication hold such title. *Kemmerer v. Kemmerer,* 233 Ill. 327, 84 N. E. 256; *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345. Since there was equitable conversion in the instant case, the statutes respecting perpetuities need not be considered even if applicable to charitable bequests.

After the decision of this court in *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258, the legislature passed ch. 511, Laws of 1905, which amends sec. 2039, Stats. (1898), by adding to the exceptions from the operation of that section real estate devised to a charitable use. So that since the passage of this amendment the statute against perpetuities (sec. 2039) does not include devises to a charitable use. However, we need not consider the effect of this amendment. Because of the doctrine of equitable conversion we are only dealing with personal property. In so far as *McHugh v.*

McCole, 97 Wis. 166, 72 N. W. 631, conflicts with anything said in this opinion it must be regarded overruled.

It follows that the bequest for masses is valid, and that the judgment of the court below must be reversed.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

The following opinion was filed May 24, 1910:

TIMLIN, J. (*dissenting*). Eighty acres of presumably agricultural land worth $6,000 mortgaged for $1,500, personal property of a value not disclosed, and $400 in money, subject to unsecured debts of $917, were disposed of by the testator by will in these words:

"After the payment of my just debts and funeral expenses, I give, devise and bequeath all the rest of my property, both real estate and personal property, for masses for the repose of my father's and mother's and sister's and brother's and my own soul. The masses will be said according to the directions of *Thomas J. Fenlon* and *J. P. Watt* of Maple Grove, Wis., and I hereby appoint them to direct when and where to say said masses. I hereby appoint *J. P. Watt* of Maple Grove, Wis., as executor of this my last will and testament."

The testator was a member of the Roman Catholic church. It will be noticed that the property is not devised or bequeathed to any designated person nor expressly in trust, nor is there any suggestion on the face of the instrument that the testator himself intended any public benefit. This last may have been supplied, however, by proof of the fact that he was a Roman Catholic, and that according to the tenets of that faith the celebration of masses, although expressly for the souls of certain designated deceased persons, nevertheless inures to the benefit of all participants in the ceremony and to the benefit of all mankind. A power, however, is given to two named persons to direct when and where the masses shall

be said. It is further provided that the masses are to be said according to the direction of these two persons; but this cannot be taken to mean that they are to alter or modify the ceremony, but, as appears from the evidence, merely to designate whether low mass or high mass is to be said, and when and where. There appears to be a wide discretion vested in these two persons with respect to the exercise of the power. There are no active duties which require the intervention of a trustee or which might change the disposition of the property from a mere passive use to an active trust, unless we infer from the will a necessity for selling and converting the land into money. It also appears from the testimony of a priest of this church that the mass is a ceremonial prayer and sacrifice, which must be celebrated by an authorized or ordained priest, but in which any member of the public may participate. The doctrine of the church is that not only the souls of the departed for which the mass is specially offered, but all present and participating in the ceremonies and, indeed, all mankind, derive spiritual benefit therefrom. The priest is bound to say the masses within a fixed time (not given) unless the individual ordering and paying for the masses grants unlimited time, and the stipend for a low mass is $1, for a high mass $5 and upward. The designation of one low mass per year as an obit would continue this trust several thousand years.

I have no doubt that any person in this state by private bequest can devote all or any part of his property to pay for masses by giving it to some designated person competent to take. I have no doubt that the celebration of masses for the souls of the dead constitutes a "public charity" or a "pious use" within the meaning of these terms at common law; and I have no doubt that the court will not permit a charitable trust to fail for want of a trustee, but will appoint one to carry it out; and I have no doubt that under the statutes of

this state relating to perpetuities charitable uses are exempted from the rules against remoteness. That statute is as follows:

"The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate and twenty-one years thereafter, except in the single case mentioned in the next section, and except when real estate is given, granted or devised to a charitable use or to literary or charitable corporations which shall have been organized under the laws of this state, for their sole use and benefit, or to any cemetery corporation, society or association." Sec. 2039, Stats. (1898), as amended by ch. 511, Laws of 1905.

This is as far as the case was presented by the appellant, and so far I agree with him. But we have in our state constitution (sec. 18, art. I) as follows:

"The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

Under this constitutional provision, can this state through its courts or legislature compel, direct, or regulate the celebration of masses? Could the attorney general on relation of any of the beneficiaries of this trust, or on his own motion, maintain an action to compel or direct the saying of these masses? I think not. If he could not, the charitable trust, if one is created, is invalid, because a charitable trust that cannot be enforced is not valid. 2 Perry, Trusts (4th ed.) §§ 708, 711. This question has usually arisen with reference to such great degree of indefiniteness that it has been

found impossible for the courts to ascertain and enforce the wishes of the testator. But the basic principle is the inability of the state to enforce the trust. Where that inability exists the charitable trust is void. *Heiss v. Murphey,* 40 Wis. 276; *Tilden v. Green,* 130 N. Y. 29, 28 N. E. 880, 27 Am. St. Rep. 487; *Bridges v. Pleasants,* 39 N. C. 26, 44 Am. Dec. 94, 101, and cases in note. The constitution prohibits any control of or interference with the right of conscience. It is manifestly no answer to this to say that there is no likelihood that the masses will be refused nor no likelihood that they will be celebrated outside of this state whereby the people of this state will have no benefit from the charity. The question is: Can the state regulate the saying of masses, and compel, if occasion requires, the saying of such masses in this state? If the state can enforce the saying of masses for the spiritual benefit of non-Catholics, who are, according to the majority opinion, with Catholics the beneficiaries of this charitable trust, the trust is valid; if not, it is invalid. It is quite idle to cite precedents upon this point from the courts of states which have no such constitutional restriction. The decision of the majority of the court in effect decides that the state has such power. This difficulty exists if we take the most favorable view of the devise, namely, that the will requires the real estate to be sold and converted into money and the proceeds of the sale used in paying for masses. If there is no such equitable conversion we run into additional difficulties. If under our statute of uses (secs. 2071 and 2073, Stats. 1898) the title of the trustee to be appointed by the court is merely nominal and is connected with no power of actual disposition or management of the land because there is no requirement of the will that the land be sold and converted into money, then the legal title, by force of these statutes, rests in the beneficiaries. But the beneficiaries must be either the departed souls, the public, *i. e.* the state of Wisconsin, or the priests who receive

the value of the use for saying masses. The souls cannot hold real estate, and the state cannot take title for the purpose of having its people receive this religious instruction under the constitutional prohibition mentioned, so the title must be in the Roman Catholic church, or in the persons who take the rents and profits for their services in celebrating the masses, or in no one. *Sullivan v. Bruhling,* 66 Wis. 472, 29 N. W. 211; *Ruth v. Oberbrunner,* 40 Wis. 238, 258; *Webster v. Morris,* 66 Wis. 366, 28 N. W. 353; *Holmes v. Mead,* 52 N. Y. 332.

If, however, it be contended that the court may change the nature of the charitable trust by not only appointing a trustee, but also by imposing upon him active duties (other than sale and conversion into money), not found in the will, or if it be considered that charitable uses are not executed by the statute, then we have a case where the use of land is held in this state upon a tenure long ago obsolete, also forbidden by our state constitution. If the land is not required to be sold, but may be held in trust indefinitely and the rents and profits devoted to paying for masses for the designated souls and incidentally for all mankind, the legal title must be in the trustee appointed by the court, the beneficial use in the religious association which receives all the rents and profits and says the masses for the public, or in the public. This is a replica of the tenure of frankalmoign or the tenure of divine service. The use of land cannot be held on any such tenure in this state, as I understand the law.

"Tenure in frankalmoign, *in libera eleemosyna,* or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors forever. The service which they were bound to render for these lands was not certainly defined; but only in general to pray for the soul of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this), because this divine service was of a higher and more exalted nature. This is the tenure, by

which almost all the ancient monasteries and religious houses held their lands, and by which the parochial clergy . . . hold them at this day. . . . And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feudal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor to correct it. Wherein it materially differs from what was called tenure by divine service; in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called free alms; especially as for this, if unperformed the lord might distrain without any complaint to the visitor. All such donations are indeed now out of use; for, since the statute of Quia Emptores (18 Edw. I.), none but the king can give lands to be holden by this tenure." 1 Cooley's Blackstone, book II, pp. 101, 102, V; *People v. Van Rensselaer,* 9 N. Y. 291, 334–336.

The constitution of this state, like those of New York, Minnesota, and Arkansas, provides (sec. 14, art. I): "All lands within this state are declared to be allodial, and feudal tenures are prohibited." Allodial is defined by Blackstone as "land possessed by a man in his own right without owing any rent or service to any superior." 2 Blackstone, 105.

"Held in free and absolute ownership, as contradistinguished from feudal tenures, which are prohibited in the same sentence and by the very next words, and the prohibition of which, with their servitudes and reservations, and all the attendant hindrances and obstacles in the way of free and ready sale and transfer of real property, constituted the chief object of the provision." *Barker v. Dayton,* 28 Wis. 367, 384, 385.

I do not think the words "feudal tenure" in the constitution should be given any such strict construction as to permit all tenures of the feudal age which were not according to the distinctions then made strictly feudal. Neither does it

necessarily limit the associated word "allodial;" but the latter word broadens the meaning of the sentence. I think the word "feudal" relates to the age and the system, rather than to specific tenures among the multiform tenures then in existence. Under such a constitutional provision we surely are not at liberty to revive a species of tenure which the foregoing quotation from Blackstone shows to have been long obsolete even in his day. Conditions, rents, and services may no doubt be exacted as a consideration for a lease, but a grant in fee of the whole land or of the use thereof cannot be upon any such tenure. Some one must own the land as an allodium. The statute Quia Emptores is part of the common law of this state, and that statute by construction long settled does not permit any such tenure as that attempted to be created by this will, if we find no mandatory requirements that the land be sold and converted into money. 1 Reeves, Real Prop. §§ 290, 291; Gray, Perpetuities, §§ 26, 28; *Van Rensselaer v. Hays,* 19 N. Y. 68. There could not be, as I understand this constitutional provision, any rent or service reserved out of a grant or devise in fee, whether such transfer be of the title or merely of the use.

The following opinion was filed June 10, 1910:

MARSHALL, J. (*concurring*). I choose to add a few words to the able opinion for the court by my Brother KERWIN, in order to make more significant that preservation of the public trust intended by the donor does not depend upon the doctrine of equitable conversion, and treat, briefly, some suggested infirmities in the trust, made during our consideration, which might otherwise cause doubt as to the soundness of the court's conclusions.

The full reintrenchment in the jurisprudence of this state of the common-law doctrine of charities was significantly commenced in *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92,

50 N. W. 1103, and though thrown, unfortunately, into some confusion thereafter, was so cleared up, as was supposed, for all time in *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345; *Hood v. Dorer,* 107 Wis. 149, 82 N. W. 546, and *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258, as to leave no vestige of the supposed application to charities of our statutory restrictions upon conveying property in perpetuity, except as to real estate. In that situation, as suggested in the opinion of the writer, concurred in by my Brother SIEBECKER, in the *Danforth Case,* legislative assistance was necessary to enable the court to rescue our system from the exceptional interference to one conveying his property to charitable uses. It was confidently thought that the people of this state, with a full understanding of such interference, would promptly, through the proper channel, speedily make the public policy of our commonwealth conform to the well-nigh worldwide conception of the importance of promoting the wishes of possessors of privately accumulated wealth to devote the same to the betterment of mankind. At the very first opportunity thereafter ch. 511, Laws of 1905, was passed, exempting real estate from the limitations upon the right to suspend the absolute power of alienation. So now one can freely convey his property in perpetuity, real or personal, in trust for any designated charitable use upon any general scheme to that end. Charity, sweet charity, has thus come into its own. This is deemed to be such a valuable consummation to the people of this state that, in a case like this, the doctrine of equitable conversion, so many times resorted to as a convenient way of avoiding the one supposed infirmity in our system hampering owners of property in their efforts to devote the same to the public good, no longer cuts any figure. In my judgment, if referred to at all, it should be relegated to an insignificant place. Here the donor had an undoubted right to devote his real estate to his chosen charity. True, if there was any doubt about it, in

view of the statute, but there is none, he had an undoubted right to leave his property to be administered as personalty, in respect to which there has never been any interference in our written law with the power to convey in perpetuity.

An idea was advanced that the constitutional right of immunity from interference in religious matters stands in the way of public enforcement of a trust of the character created. The answer to that is that no public enforcement would ever in any event be required, except as to contractual features. The constitution does not exempt religious orders or ministers of the gospel from their obligations of contract. In that field they are amenable to the law of the land the same as individuals in any other field. If one should devise his property to a minister of the gospel or a church society to build a church edifice and the devisee should accept the trust, could such donee be heard successfully to claim immunity from legal coercion to carry out the agreement? That simple proposition, it would seem, shows clearly that if the donee of a trust for masses accepts the offer he thereby makes a promise subject to enforcement like any other promise. He could not for a moment in any court be heard to say, I will not keep my agreement and am entitled to protection in my breach under my constitutional immunity from interference in religious matters. The attorney general in proceeding to enforce such a trust is merely asserting the inviolability of a public contract.

The suggestion that the title to the property, considered as realty, by force of the statutes (secs. 2072 and 2073, Stats. 1898), is in the beneficiaries, since there is no power of disposition. That view overlooks the fact that the statutes have nothing to do with trusts for charity; that in such cases the legal title is always in the trustees and the equitable title in the beneficiaries. Many mistakes have been made by confusing private with charitable trusts, as shown in *Harrington v. Pier, supra.* In the latter, though the trustees have no

duty whatever to perform, except to hold the title and preserve it for the designated public purpose, the nature of the right is strictly legal while the equitable interest is in the beneficiaries which, from the very nature of the trust, must be indefinite. Any other view would defeat the law of 1905 and perpetuate the very difficulty the legislature intended, by it, to abolish. I take it that there is no room for fair controversy but that the equitable, not the legal title, is vested in the beneficiaries and the legal title rests in the trustee. That is the logic of *Harrington v. Pier, supra,* and of authorities generally on the subject. So, notwithstanding the form of the donation is for the repose of souls of the departed, the beneficiaries include the living as well; the great public, and the state, through its law officer, possesses full authority to invoke judicial remedies to prevent any abuse of the trust.

This further reason why a conveyance of realty in trust for perpetual charitable uses is not valid was advanced: that the very constitutional status of titles to real estate precludes such a trust. In that reference was made to art. I, sec. 14, of the constitution, declaring that "all lands within this state are declared to be allodial, and feudal tenures are prohibited." By that, it is suggested, "all hindrances and obstacles in the way of free and ready sale of real property are nugatory." The logic of that idea would render void all restraints upon the conveyance or use of real estate. No one would possess authority to hold, convey, or enjoy such property for a limited purpose or period. That doctrine was advanced in *Barker v. Dayton,* 28 Wis. 367, but rejected as unsound though ingenious. The argument of counsel who contended for the doctrine which is contrary to the practice under our constitution since its adoption and similar constitutions elsewhere, reasoned from the lexical meaning of the word "allodial" standing alone. This court rejected counsel's logic, holding that the use of the term "and feudal ten-

ures are prohibited," following and in close connection with the term "all lands within this state are declared to be allodial," gave to the whole the meaning that the ownership of realty is free from those restraints which were characteristic of the feudal system; that the possessor of the title no longer is to be regarded as merely holding by the grace of a sovereign lord and subservient to "homage or fealty or military service," but as holding by right. Properly understood the allodial character of title to real estate, instead of suggesting incapacity to convey the same to charitable uses, rather suggests absolute freedom in that regard. The contrary idea advanced during the discussion of this case as inimical to the validity of the trust in question would, of course, defeat any trust in real estate whether for a limited period or in perpetuity. It would strike the public as passing strange if they were confronted with a judicial declaration that no man could hold or transfer any other than an unrestricted title to real estate characterized by unrestricted right of disposition. It seems that the idea was most emphatically rejected as unsound some forty years ago in *Barker v. Dayton, supra.* As there said, in effect, the only meaning of the constitutional provision is, that titles to realty in this state are free from any incumbrance in the nature of rent or service or fealty to a superior, as under the feudal system.

SIEMERS and others, Respondents, vs. MEEME MUTUAL HOME PROTECTION INSURANCE COMPANY, Appellant.

April 27—May 24, 1910.

Fire insurance: Provision that all owners must be named: Waiver: Increase of risk: What constitutes: Policy construed: Duty of insured as to saving property: Appeal: Findings: Trial: Order of proof.

1. A fire insurance policy provided that "all property must be insured in the names of all the owners, and the application must state the name of each owner or the policy will be void." Whether it was a violation of that provision to obtain insurance in the name of the widow alone, upon property which had descended to children of an intestate subject to the dower and homestead rights of the widow, not determined.
2. Knowledge on the part of the secretary of the insurance company, when writing the policy, of the actual state of the title, was an effectual waiver of the foregoing provision of the policy.
3. A finding by the jury that removal of the spark arrester and the subsequent operation of a steam engine for a few minutes without such arrester did not materially increase the risk of fire, is sustained in this case by the evidence, in which there was nothing to show that the removal of the arrester was the proximate cause of the fire.
4. A clause in a policy insuring farm buildings, to the effect that "if the risk should be increased by any means whatever within the control of the assured, or be occupied in any way whatever so as to render the risk more hazardous," the insurance should be void, was not violated by the use on the premises, and within sixty feet of a barn in which the fire started, of a steam engine for the purpose of cutting ensilage.
5. Insurance must be presumed to be made with reference to the character of the property insured and to cover risks incident to its use in the ordinary way; and the clause above quoted has reference to some permanent change in the character or condition of the insured property, not to a temporary change in the risk which is a mere incident to its ordinary use.
6. A clause in a fire insurance policy providing that the insurer shall not be liable for loss caused by the use of steam threshing machines unless certain specified precautions are taken, does not prohibit the use of steam thresher engines except for threshing, nor on the other hand does it permit their use for other purposes without taking those precautions.

7. A provision in the policy that "in case of fire . . . or exposure to loss or damage thereby" the insured shall use their best endeavors for saving and preserving the property, defines the duty of the insured after the property covered by the policy is on fire or menaced by a fire in its vicinity, and has no reference to acts or omissions preceding the fire.
8. It is within the discretion of the trial court, and entirely proper, to permit plaintiff to prove a material fact after defendant has rested, though not properly rebuttal, where proof thereof at the proper time was omitted through inadvertence.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The plaintiff *Ida Siemers* is the mother of *Fred* and *Edward F. Siemers,* her coplaintiffs. F. A. Siemers, the husband and father, died intestate on March 29, 1896, leaving six children and the widow living. The estate was administered in the county court, and in 1900 the lands and personal property were assigned to the six children subject to the homestead and dower rights of the widow. The farm and personal property were occupied and used by the widow until December 1, 1903, when she leased the farm to her two sons who are her coplaintiffs herein. On December 11, 1903, the widow, by bill of sale, sold the farm machinery, grain, hay, and live stock to her two sons, *Fred* and *Edward F. Siemers.* On July 28, 1903, said widow applied to the defendant company for a policy of insurance for a term of five years in the sum of $6,000 covering farm buildings, hay, grain, farm implements, live stock, and household goods, which policy was thereafter issued to the plaintiff *Ida Siemers.* The defendant is a town mutual insurance company. On January 18, 1904, the widow assigned her rights in the insurance policy to her sons *Fred* and *Edward F.,* except in so far as it covered buildings, household goods, wearing apparel, provisions, and musical instruments, which assignment was approved by the defendant. All of the buildings insured were located on the homestead forty.

On September 27, 1907, the plaintiffs *Fred* and *Edward*

F. Siemers were cutting ensilage, the power used to drive the feed cutter being a steam engine ordinarily used for the purpose of running a threshing machine. The smokestack of the engine where it was set in place was twenty feet distant from the nearest corner of an adjacent building. The engine was a wood burner. The fire occurred shortly after the workmen went into the house to dinner. Some minutes before quitting at noon, the plaintiff *Edward F. Siemers* took the spark arrester out of the smokestack of the engine and operated the same without the use of the screen or spark arrester, and left the engine with the spark arrester removed when he and the others went in to dinner. Very shortly after the parties went to dinner the fire was discovered in a barn about sixty feet distant from the smokestack of the engine. All of the farm buildings were destroyed and most of the personal property. On the trial there was no controversy as to the amount of the loss.

The defendant, after receiving notice of the loss, proceeded to investigate the same, all nine of its directors being present on the 27th day of September, 1907, when such investigation was being carried on. Some testimony was taken, and it was unanimously decided by the directors that the company was not liable for the loss because no watchman had been employed and because the spark catcher was removed from the engine while the same was in operation. On October 2, 1907, two of the plaintiffs were notified of such conclusion, the grounds stated in the letter of notification being that plaintiffs did not "comply with our by-laws, section 21, as to a watchman, and by removing the spark catcher while the engine was in operation."

The plaintiff *Ida Siemers* brought an action to recover the sum of $4,100 because of loss on the items of property insured in her name, consisting of the various buildings and household furniture, wearing apparel, and musical instruments. The plaintiffs *Fred Siemers* and *Edward F. Sie-*

mers commenced another action against the defendant to recover the sum of $1,900 because of the loss of certain personal property consisting of hay, grain, farming utensils, and live stock. The actions were consolidated. On the part of the defendant it was contended on the trial that it was not liable because (1) the property was not insured in the name of the owner as required by the terms of the policy; (2) because the risk was increased by placing and operating an engine at the time, in the manner, and for the purpose for which it was operated, in violation of the terms of the policy; (3) because the insured violated the clause in the policy requiring the insured to use their best endeavors for saving and preserving the property; (4) because the insured failed to keep a watchman around the engine as required by the terms of the policy.

The jury found (1) that at the time the policy in suit was issued William Fenn, the secretary of the company, who issued the policy, knew that the children of the plaintiff *Ida Siemers* were the owners of the lands on which the insured buildings stood, subject to her dower and homestead rights in said lands as widow; (2) that the removal of the spark arrester from the smokestack on the day of the fire, and the subsequent operation of the engine for a period of five or six minutes without the arrester, under the existing circumstances, did not materially increase the risk; (3) that the removal of such spark arrester and the subsequent operation of the engine while it was removed did not constitute failure on the part of the insured to exercise ordinary care; (4) that one Louis Voss acted for plaintiffs in the capacity of watchman in attendance to watch the engine during all the time it was in operation on the forenoon of the day on which the fire occurred.

On the verdict so returned, judgment was rendered in favor of the plaintiff *Ida Siemers* for $3,441.90 damages, with interest and costs, and in favor of the plaintiffs *Fred*

and *Edward F. Siemers* for $1,406, together with interest and costs. From the judgment so entered this appeal is taken.

For the appellant there was a brief by *Hougen & Brady,* and oral argument by *A. L. Hougen.* Upon the question of waiver they contended that the knowledge of the title possessed by the secretary, having been derived in previous transactions wherein he was not acting for the company, and in which it was not concerned, was not binding on the company, citing *United Nat. Bank v. German Ins. Co.* 71 Fed. 473; *Shaffer v. Milwaukee M. Ins. Co.* 17 Ind. App. 204, 46 N. E. 557; *St. Paul F. & M. Ins. Co. v. Parsons,* 47 Minn. 352, 50 N. W. 240; *Trentor v. Pothen,* 46 Minn. 298, 49 N. W. 129; *Ordway v. Chase,* 57 N. J. Eq. 478, 42 Atl. 149; *Phœnix Ins. Co. v. Flemming,* 65 Ark. 54, 67 Am. St. Rep. 900, 906; *Conn. F. Ins. Co. v. Smith,* 10 Colo. App. 121, 51 Pac. 170; *Keith v. Royal Ins. Co.* 117 Wis. 531; *Woodard v. German-Am. Ins. Co.* 128 Wis. 1.

For the respondents there was a brief by *Nash & Nash,* and oral argument by *A. L. Nash.*

BARNES, J. 1. The appellant contends that the policy of insurance became void because the following clause found therein was violated by the insured:

"All property must be insured in the names of all the owners, and the application must state the name of each owner or the policy will be void."

In this case the insured buildings, being a part of the homestead, descended to the widow during widowhood. Sec. 2271, Stats. (1898). Whether it was a violation of the terms of the insurance contract to insure the property in her name, rather than in the joint names of the widow and the remaindermen, is a doubtful question in view of the following cases decided in this court: *Johannes v. Standard*

Fire Office, 70 Wis. 196, 35 N. W. 298; *Vankirk v. Citizens' Ins. Co.* 79 Wis. 627, 48 N. W. 798; *Carey v. Liverpool & L. & G. Ins. Co.* 92 Wis. 538, 66 N. W. 693; *Schultz v. Caledonian Ins. Co.* 94 Wis. 42, 68 N. W. 414; *Davis v. Pioneer F. Co.* 102 Wis. 394, 78 N. W. 596; *Matthews v. Capital F. Ins. Co.* 115 Wis. 272, 91 N. W. 675; *Wolf v. Theresa Village Mut. F. Ins. Co.* 115 Wis. 402, 91 N. W. 1014; *Evans v. Crawford County F. Mut. F. Ins. Co.* 140 Wis. 189, 109 N. W. 952. It is unnecessary to decide the point.

The jury found that William Fenn, the secretary of the defendant company, who wrote the policy in suit, knew at the time the policy was written that the children of the plaintiff *Ida Siemers* were the owners of the real estate insured, subject to the homestead and dower rights of said plaintiff. Appellant's counsel vigorously attack this finding as not being supported by the evidence. The evidence was sufficient to warrant the jury in reaching the conclusion which it did reach. Mr. Fenn was a near neighbor of the insured for many years, and it would not be at all remarkable that he should know or be entirely satisfied as to where the title to the property rested, and he testified that as a matter of fact he did know when he wrote the policy. That such knowledge was an effectual waiver of the requirement of the insurance company, as regards title to the insured real property, is established beyond cavil. Many of the cases so holding are cited in *Metcalf v. Mutual F. Ins. Co.* 132 Wis. 67, 73, 112 N. W. 22. Other cases to the same effect are *McFetridge v. American F. Ins. Co.* 90 Wis. 138, 62 N. W. 938; *Goss v. Agricultural Ins. Co.* 92 Wis. 233, 65 N. W. 1036; *Schultz v. Caledonian Ins. Co.* 94 Wis. 42, 68 N. W. 414; *St. Clara F. Acad. v. Northwestern Nat. Ins. Co.* 98 Wis. 257, 73 N. W. 767.

2. It is next urged that by placing and operating the en-

gine at the time, in the manner, and for the purpose for which it was operated, the policy became void because the following provision of the insurance contract was violated:

"If . . . the risk should be increased by any means whatever within the control of the assured, or be occupied in any way whatever so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect."

The contention is that the foregoing clause in the insurance policy was violated in two respects: (1) By running the engine for a few minutes without the spark arrester; and (2) because of running the engine at all for the purpose of cutting ensilage. The jury found that the risk was not increased because of running the engine without the spark arrester. There was very little evidence introduced on either side bearing on the question, and there is no evidence to show that the removal of the spark arrester was the proximate cause of the fire. This court would not be warranted in setting the finding aside.

The second objection presents a much broader proposition and necessitates a construction of the policy. There was no direct evidence in the case as to what caused the fire. The inference is strong that the steam engine was responsible for it. If so, if the engine had not been operated, the fire would not have occurred. Therefore, by operating the engine, the plaintiffs increased the fire hazard and they cannot recover. Such is the construction which the defendant now places on its contract, although it did not so construe it when it declined to pay the loss, and such is the construction which it asks the court to place thereon. The provision is one commonly found in policies of insurance, and is in substance embodied in the standard fire insurance policy adopted by the legislature of Wisconsin. Sec. 1941—46, Stats. (1898). People insure against their own negligence as well as that of their neighbors, and against those untoward events which hu-

man foresight is unable to prevent. Farmers have little to apprehend in the way of fire hazard from neighboring property. Their losses occur from accidental causes which cannot be avoided and from acts of omission or commission on their part which might have been guarded against. It is safe to say that by far the larger proportion of losses occur from the causes last named. If a fire is started by reason of an additional stove being set up after a policy is written, or by reason of the lighting of a match or the building of a mosquito smudge, or the use of a kerosene lantern around outbuildings, has the insured increased the risk by a means within his control and thus forfeited his right to recover? Owners of farm property hardly understand that by insuring their property they are debarring themselves of the right of carrying on their operations in the ordinary way.

Fire hazard is a variable quantity. It changes constantly from day to day, and sometimes imperceptibly, from the operation of the laws of nature and from various circumstances beyond the control of the insured. Such influences must, in general, unless unusual or extraordinary, be considered as a necessary part or incident of the risk which the insurer has undertaken to bear. It is not to be supposed that the insured has guaranteed that no improvements or changes shall be made anywhere in the vicinity of the insured property during the life of the insurance, but it is reasonable to exact an obligation from him that he shall not allow or permit a change to be made in the structure, nature, or habitual use of the insured property materially different from that which the insurer has agreed to undertake. Richards, Ins. (3d ed.) p. 329. But trivial or temporary variations in the risk incident to the ordinary use of the insured property are presupposed by the contracting parties to be likely to occur. *Kircher v. Milwaukee M. Mut. Ins. Co.* 74 Wis. 470, 43 N. W. 487. Insurance must be presumed to be made with reference to the character of the property insured and to the

owner's use of it in the ordinary way and for the purpose for which such property is ordinarily held and used, or to cover risks incident to such use. 1 May, Ins. (4th ed.) § 219, and cases cited.

It is a matter of common knowledge that cutting fodder by hand, horse, steam, or gas engine power is a very customary operation on farms. We think that when the contract was made it was fairly within the contemplation of the parties that such work might be carried on, and that a steam engine might be employed in doing such work unless its use was specifically forbidden by the policy, and that the court committed no error in refusing to submit a question to the jury asking whether the risk had been increased by its use. The clause in question has reference to some permanent change in the character or condition of the insured property, and not to a temporary change in the risk, which was a mere incident to the ordinary use of the property.

We think the position of the appellant is not sound for another reason. The policy expressly provided that the company should not be liable for loss caused by the use of steam threshing machines unless (1) a ladder was kept between the engine and the separator; (2) one barrel of water and two pails were kept between the engine and the barn ready for use; and (3) a watchman was always in attendance to watch the engine during its operation. The policy of insurance should be liberally construed in favor of the insured, particularly when a strict construction would work a forfeiture. *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 1 N. W. 393; 19 Cyc. 656, 657, and cases cited.

It is apparent that the hazard which the defendant sought to minimize was the use of steam engines around farm buildings. While the policy uses the words "steam threshing machines," yet, taking the provision as a whole, we think it was its intent and meaning that steam threshing machine engines should not be employed in the ordinary operations carried on around farm buildings unless the required precau-

tions were taken. This is a fair construction of the policy to the insured and the insurer. It seems to be acquiesced in, to some extent at least, by counsel for the appellant, as it is urged as one of the grounds of error that no recovery can be had because the required precautions were not taken. The converse of the proposition stated would be, not that the use of steam engines was forbidden for other purposes than threshing, but that as to other kinds of work which might be done by them the precautions stipulated for in the policy need not be adopted.

3. It is next claimed that the plaintiffs violated the following clause in the insurance policy:

"In case of fire . . . or exposure to loss or damage thereby, it shall be the duty of the insured to use their best endeavors for saving and preserving the property."

The contention is that by taking off the spark arrester the plaintiffs did not comply with the foregoing requirement. It is manifest that this provision defines the duty of the insured when the property covered by the policy is on fire, or when it is so menaced by fire in its vicinity that damage is likely to result. In such a case the policy-holder is obligated to minimize his damages by using all reasonable efforts to prevent unnecessary loss. The insured did their full duty under this clause by saving all of the insured property that they could after they discovered the fire.

4. It is further urged that the insured violated the conditions of the policy by failing to keep a watchman, a barrel of water and pails, and a ladder as provided thereby. The jury found on sufficient evidence that a watchman was employed as required by the policy. The evidence to show that a ladder, an abundance of water, and the prescribed number of pails were provided as required was convincing and was uncontradicted, and as to such requirements the evidence presented no controversy and no issue was raised for the jury to pass upon.

5. It is also argued that the court erred in permitting the

plaintiffs to introduce evidence that was not rebuttal after the defendant rested. In view of the fact that the evidence showed the condition of the title before plaintiffs rested their case in chief, it was incumbent on them to show a waiver of the forfeiture before resting rather than after the defendant rested. This they did not do. But it was entirely proper for the court to permit the evidence to be offered later. Courts are established for the purpose of getting at the rights of the parties who come before them with controversies, and such rights should not be defeated by technical rules. It is necessary that the trials be carried on in an orderly way. However, where counsel, through some inadvertence, fail to prove some vital fact at the proper time, the client should not be turned out of court because of such failure if he in fact has a meritorious cause of action.

By the Court.—Judgment affirmed.

SHEBOYGAN COUNTY, Appellant, vs. GAFFRON, Respondent.

April 27—May 24, 1910.

County superintendents: Term of office: Increase of salary.

1. A county superintendent of schools, even though his jurisdiction be confined to a district less than the whole county, is a county officer whose term of office continues for two years and *until his successor is qualified*, and under sec. 694, Stats. (1898), his salary cannot be increased or diminished during such term.
2. Where, pursuant to ch. 307, Laws of 1903, changing the time for election of county superintendents, a superintendent continued in office for six months after the two years for which he was originally elected, such six months were part of his original term, and an increase of salary which had been voted by the county board during such two years had no application to such six month

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Edward Voigt, district attorney, for the appellant.
M. C. Mead, for the respondent.

WINSLOW, C. J. Action to recover an alleged overpayment of salary. The facts are simple. The defendant was appointed county superintendent of schools for Sheboygan county for the two-year term beginning on the first Monday of January, 1903, the county board having previously fixed the salary at $1,000 per annum. In November, 1904, the county board fixed the salary at $1,200 per annum. The defendant held office two years and six months; *i. e.* until July, 1905. He was paid $600 for the last six months. Was he entitled to that sum, or should he have been paid $500 only? The circuit court decided that he was entitled to $600, and the county appeals.

We think it clear that the trial court erred. The superintendent of schools, even though his jurisdiction be confined to a district and does not cover the whole county, is a county officer, and his term of office, like that of other county officers, continues for two years and until his successor is qualified. Sec. 698, Stats. (1898). The salary of no county officer can be increased or diminished during his term of office. Sec. 694, Stats. (1898). The defendant held office until July, 1905, because the legislature, by ch. 307 of the Laws of 1903, changed the time of electing county superintendents from the fall to the spring, and provided that the first superintendent elected under the new law should be elected in April, 1905, and take his office the first Monday in July following. This law also provided that the superintendent elected in 1902 should continue in office until the last-named date, but this latter clause gave the defendant no new term. It was entirely superfluous and accomplished nothing. Under his original appointment his term ran until his successor was qualified. The increase of salary voted by the county board in November, 1904, had no application to

the last six months of his holding because that six months was a part of his original term of office and there could be no increase during his term. Ch. 307 of the Laws of 1903 neither expressly nor impliedly repeals the provisions of sec. 694 preventing the change of salary during the term.

These considerations render it unnecessary to consider the question whether under the provisions of sec. 9 of art. XIII of the constitution the legislature had the power to extend the term of defendant's office. *O'Connor v. Fond du Lac*, 109 Wis. 253, 85 N. W. 327.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the plaintiff according to the prayer of the complaint.

ARTHUR, Respondent, vs. ARTHUR, Administrator, Appellant.

April 27—May 24, 1910.

Advancements: Evidence.

1. Sec. 3959, Stats. (1898)—providing that "all gifts and grants shall be deemed to have been made in advancement if they are expressed in the gift or grant to be so made or if charged in writing by the intestate as an advancement or acknowledged in writing as such by the child or other descendant,"—excludes by implication all other evidence to prove an advancement than such as is there indicated.
2. The charge in writing by which, under said sec. 3959, an advancement may be evidenced, must be made contemporaneously with the gift or grant.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

This is an appeal from a judgment of the circuit court for Grant county reversing a judgment of the county court of Grant county allowing the final report and account of *Sam-*

uel Arthur, administrator of the estate of John Arthur, deceased. The court below made the following findings of fact and conclusions of law:

John Arthur died intestate at the city of Platteville, where he had lived many years, on December 10, 1905, aged eighty-six years. He left as his only heirs his four sons, *James, Samuel* (the appellant), Charles A., and Harry R., all men of middle age. He died owning no real estate, and the inventory of his personal estate amounted to $11,650.50, which included a note from the respondent, *James Arthur,* to his father for $1,663, dated May 23, 1902, which drew interest at three per cent. In January, 1902, and for more than ten years prior thereto, said John Arthur owned a farm of 400 acres in Woodbury county, Iowa. It had been bought for him by his agent, John Rawlings, his brother-in-law, who was during all the time John Arthur owned this farm his agent to rent it and supervise it. Said agent transacted all of the business relative to said farm and made all the settlements for rent, etc., with the tenants. The evidence shows that John Arthur was not upon said farm more than twice while he owned it. Rawlings as such agent rented the farm March 1, 1893, to *James Arthur,* the respondent, and he continued to occupy it as tenant until May, 1902. About the middle of May, John Arthur, by written contract executed at Platteville, contracted to deed this farm to N. J. Bennett for $14,000, said Bennett paying down $3,000 and taking possession at once. Immediately after said contract of sale, Rawlings, acting as agent of John Arthur, had a settlement with *James Arthur* of all matters connected with the tenancy of *James,* including the balance due for rent from *James* to his father, which was found to be $1,663. On the 23d day of May, 1902, *James* gave his father his note for said amount. The father kept the note until his death, and this is the note that is inventoried as a part of John Arthur's estate. The evidence shows that no more than said sum was due from

James for the rent of said land, and there is no evidence that *James* ever rented any other land of his father or that he owed him for anything else.

On February 25, 1903, said N. J. Bennett received a deed from John Arthur of said farm and settled the remainder of the purchase price, the interest appearing to have been paid to that date. Simultaneously with the delivery of the deed to him, Bennett gave to John Arthur a note for $1,000 and by his direction executed to each of his sons, Charles A. Arthur and *Samuel Arthur,* a note for $5,000, and secured the two notes by a mortgage on said farm. Bennett has since paid all three of said notes and said mortgage has been released; *Samuel,* Charles, and Harry all joining in the release of said mortgage. In March, 1903, Charles A. Arthur duly assigned to his father, John Arthur, his said $5,000 note and his interest in said mortgage as security for the payment to his father annually until his death of the sum of $150. On the same day *Samuel Arthur* executed a similar assignment to his father of his $5,000 note and his interest in said mortgage to secure a like payment by him. Both of said assignments were recorded in the office of register of deeds of Woodbury county, Iowa, March 14, 1903. After making these mortgages to Charles and *Samuel* and the execution of the assignments to John Arthur as security, John Arthur gave his son Harry Arthur a $5,000 interest John Arthur had by mortgage or otherwise in a farm known as the John Hellmer farm, and took from Harry written security to pay him (John) $150 annually while he lived. Later, for some reason it was arranged between *Samuel* and his father that *Samuel* should transfer to Harry the interest he (*Samuel*) had in the Bennett mortgage, and that *Samuel* should receive a $5,000 mortgage on the Hellmer farm. Accordingly the $5,000 Bennett note was transferred to Harry, and the father executed an instrument in writing purporting to be an assignment of an interest in the Bennett mortgage to Harry.

Samuel received said Hellmer mortgage, and the evidence does not show any assignment of the Bennett mortgage from *Samuel* to Harry. The assignment executed by John Arthur to Harry Arthur, dated June 27, 1905, and recorded in the register of deeds' office of Woodbury county, Iowa, on July 1, 1905, recites that John Arthur sells, assigns, and sets over to Harry Arthur "all of the interest in and to a certain indenture of mortgage which I purchased from *Samuel Arthur* on the 9th day of March, A. D. 1903, reserving, however, the sum of $150 annually out of said mortgage or interest therefrom until the date of my death, which said mortgage was executed by N. J. Bennett." The assignment describes the Bennett mortgage, and states that the assignee shall have all the interest of the assignor in said mortgage subject to the payment to him until his death of the sum of $150 annually.

The value of the entire property of John Arthur, including the aforesaid note of *James Arthur* for $1,663, at the time of deeding the farm to Bennett, did not exceed $26,000. James Dolan, an attorney of the city of Platteville, was John Arthur's legal adviser, and appears to have drawn all of the papers that were executed by John Arthur and in evidence in this case. Mr. Dolan testified that John Arthur was averse to making a will, and his testimony, with the other evidence, shows that John Arthur desired to distribute his property equally among his children, reserving enough to insure himself a comfortable maintenance while he lived. On the 28th day of October, 1905, six weeks before his death and four months after making said instrument of assignment to Harry, John Arthur executed the following paper in writing:

"This is to certify that I have made advancements to each of my four sons and only heirs at law out of my estate as follows: To my son *Samuel Arthur* five thousand (5,000) dollars (mortgage on John Hellmer farm, N. E. ¼, sec. 33, T. 3 N., R. 1 W. of the 4th P. M. in Grant county, Wiscon-

sin); to my son *James Arthur* five thousand (5,000) dollars in rent on farm at Oto, Iowa, which farm I afterwards conveyed to N. J. Bennett; to my son Charles A. Arthur five thousand (5,000) dollars, one-half interest in N. J. Bennett mortgage, which mortgage is against the above-mentioned farm at Oto (Iowa); and to my son Harry R. Arthur five thousand (5,000) dollars, one-half interest in N. J. Bennett mortgage, which mortgage is against the above-mentioned farm at Oto, Iowa.

"Dated at Platteville, Grant county, Wisconsin, this 28th day of October, A. D. 1905. JOHN ARTHUR. [Seal.]

"State of Wisconsin, Grant County—ss.

"Personally came before me this 28th day of October, 1905, the above-named John Arthur, to me known to be the identical person who executed the foregoing instrument, and acknowledged the same to be his free act and deed for the uses and purposes therein mentioned.

"JAMES DOLAN,
"Notary Public, Grant County, Wisconsin.

"My commission expires October 3, 1909."

As conclusions of law it is determined that judgment upon this appeal be entered that that part of the judgment of the county court which determines that John Arthur, deceased, "made no valid advancement to *Samuel Arthur,* Charles A. Arthur, or Harry R. Arthur" be reversed, as likewise all of said judgment providing for the settlement of the administrator's accounts, and distribution of the estate without any charges made for advancements, and directing that said county court, in the settlement of the estate of John Arthur, charge *Samuel Arthur,* Charles A. Arthur, and Harry R. Arthur $5,000 each for advancements received from John Arthur, and that the appellant recover his costs upon this appeal.

Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *James Dolan* and *Jones & Schubring,* and oral argument by *B. W. Jones.*

For the respondent there was a brief by *T. L. Cleary* and *E. M. Lowry,* and oral argument by *Mr. Cleary.*

KERWIN, J. The question in this case is whether the transfer of $5,000 worth of property to each of the three sons of John Arthur—*Samuel,* Charles, and Harry—amounted to an advancement to each of them which should be charged against him in the settlement of the estate of his father. The court below in a lengthy and able opinion held that the sums given were advancements and not gifts; therefore that each should be charged with the amount so advanced in the settlement of John Arthur's estate. The grounds of decision of the court below are, in effect, that the evidence tends to show that John Arthur desired to distribute his property equally, and the court recites the certificate set out in the findings, made at least four months after the transfers, to the effect that John Arthur had made advancements to each of his four sons of $5,000; that, independent of the statute regarding proof of advancements (sec. 3959, Stats. 1898), a presumption is raised upon the facts that the gifts were advancements, and that such presumption is controlling unless rebutted by evidence; and that but for sec. 3959, Stats. (1898), he would hold that the gifts to Charles, *Samuel,* and Harry were advancements under the evidence. The court below then proceeds to discuss sec. 3959, Stats. (1898), and the effect of the certificate referred to and put in evidence, and argues that the statute does not require the charge to be made at the time of making the gifts; that, since the facts and circumstances show that the gifts were intended as advancements, there is nothing in the language of the statute or in reason why the parent afterwards may not in writing declare the gifts to have been advancements, and thereby comply with the statute. *Pomeroy v. Pomeroy,* 93 Wis. 262, 67 N. W. 430, and *Ludington v. Patton,* 121 Wis. 649, 99 N. W. 614, are referred to and held not controlling.

It may be that, in the absence of a statute prescribing the manner of proving advancements, the proof would have been sufficient to support the findings and judgment below. But in the face of our statute (sec. 3959) we cannot find that it is. The assignments of the $5,000 interest to each of the three sons bear upon their face no evidence that they were advancements. True, the age of John Arthur when the assignments were made, the fact that the property assigned amounted to more than half of his estate, and that he was averse to making a will, and perhaps some other facts and circumstances appearing in evidence, might be sufficient to raise a presumption that the gifts were advancements without the certificate of October 28, 1905, were it not for the statute referred to. But in face of the statute we fail to find sufficient proof, unless the certificate was admissible in evidence. The statute (sec. 3959) provides:

"All gifts and grants shall be deemed to have been made in advancement if they are expressed in the gift or grant to be so made or if charged in writing by the intestate as an advancement or acknowledged in writing as such by the child or other descendant. . . ."

This statute at least by implication excludes other proof of advancement and provides for proving an advancement. *Bulkeley v. Noble,* 2 Pick. 337; *Barton v. Rice,* 22 Pick. 508. In Massachusetts the statute is the same as our own, and in *Barton v. Rice, supra,* the court said:

"The statute does not expressly declare that an advancement shall not be proved in any other manner, but that undoubtedly is the meaning of the statute."

And in *Bigelow v. Poole,* 10 Gray, 104, 105, it is said:

"It is the settled law of this commonwealth that an advancement, whether of real or personal property, made by an intestate to his child or other descendant, must be proved by the evidence prescribed by our statutes, and by no other."

The construction placed upon the statute by the Massachusetts court has been adopted by this court. In *Pomeroy*

v. Pomeroy, 93 Wis. 262, at page 266 (67 N. W. 430, at page 431), this court said:

"It follows that the construction given to this statute by the Massachusetts court became, on its adoption here, a part of the law of this state. We therefore hold that parol evidence is inadmissible to prove an advancement; that, though the statute does not expressly declare that an advancement shall not be proved in any other manner than that indicated therein, such is undoubtedly its meaning; that, by prescribing a particular manner for proving an advancement, by implication all other evidence is excluded."

To the same effect is *Ludington v. Patton,* 121 Wis. 649, 662, 99 N. W. 614.

Since the evidence independent of the certificate was not sufficient to establish that the transfers were advancements, the question arises whether the certificate was competent. This certificate was made some four months after all the transfers were completed and delivered, and it is insisted by respondent that it was competent as tending to show the intention of John Arthur and in harmony with the statute, because the statute does not provide when the charge shall be made. The statute, however, has been construed by this court in two cases (*Pomeroy v. Pomeroy,* 93 Wis. 262, 67 N. W. 430, and *Ludington v. Patton,* 121 Wis. 649, 662, 99 N. W. 614) contrary to the contention of the respondent. In the *Pomeroy Case,* after reviewing the Massachusetts cases under a similar statute, it is held that parol evidence is inadmissible to prove an advancement, and that all other evidence than that prescribed by the statute is excluded by implication. And in the *Ludington Case* it was held that the charge in writing must be made at the time of delivery of the property. The court said (121 Wis. 663, 99 N. W. 618):

"The statute is mandatory and must be enforced as written. *Pomeroy v. Pomeroy,* 93 Wis. 262, 67 N. W. 430. It clearly contemplates that a delivery of property by one to an-

other, the latter having claims upon the former's bounty, is not to be deemed an advancement unless it is given that character at the time of such delivery, either by a declaration in the writing making the bestowal, or by an acknowledgment in writing at that time by the recipient of the bounty, or by an expression of the donor in respect to the matter in charging the property to the person receiving the same."

But it is said in the opinion of the learned trial judge, and so argued by counsel here, that the question as to when the charge of advancement must be made was not involved in the *Ludington Case*. The question of the construction of the statute (sec. 3959) was involved and under consideration, and it is clear from the briefs of counsel in the case that whether the writing or charge referred to in the statute should be contemporaneous with the advance was also regarded in the case by counsel as necessarily considered in construing the statute as applied to the facts of the case then under consideration. It is also clear from the opinion that this court regarded the point as necessarily in the case and one of the propositions upon which the decision of the court rested. But even if we should consider what was said in the *Ludington Case* on the point as *obiter*, we see no reason to depart from the conclusion reached and declared by the court, and we adhere to the construction put upon the statute in that case. The manifest purpose of the statute in making the charge in writing evidence of an advancement is that the charge must be made contemporaneously with the advancement. This is in harmony with the rule respecting book accounts. In *Marshall v. Coleman*, 187 Ill. 556, at page 580 (58 N. E. 628, at page 636), the court said:

"Book accounts are only admissible in favor of the party who keeps them when the entries are made contemporaneously with the transactions recorded, and the same rule applies to books and entries of deceased persons. 1 Greenl. Ev. (13th ed.) § 118; 1 Whart. Ev. §§ 246, 688; 2 Woerner, Adm'n (2d ed.) § 558; *Nelson v. Nelson*, 90 Mo. 460, 2 S.

W. 413. 'Declarations or book entries of the donor subsequent to the transaction are inadmissible unless they are of the *res gestæ* or against interest.' 2 Woerner, Adm'n (2d ed.) § 558."

See, also, *Young v. Young,* 204 Ill. 430, 68 N. E. 532; *Nelson v. Nelson,* 90 Mo. 460, 2 S. W. 413.

Nor were declarations of John Arthur made after the transfers admissible to prove advancements. *Kimball v. Leland,* 110 Mass. 325; *Harness v. Harness,* 49 Ind. 384; Thornton, Gifts & Advancements, p. 198, § 224; *Howard v. Howard,* 101 Ga. 224, 28 S. E. 648. It will be seen that the cases from other jurisdictions are in harmony with the decisions of this court heretofore cited. Indeed, it is unnecessary to go outside of the decisions of this court. The *Pomeroy* and *Ludington Cases* are decisive of the propositions involved.

It follows that there is not sufficient evidence to support the findings or conclusions of the court below to the effect that the transfers to the sons of John Arthur, deceased, were advancements, or to warrant the court below in reversing the judgment of the county court in part. The judgment below must therefore be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to affirm the judgment of the county court and for further proceedings according to law.

WILL OF HAWKINSON: HAWKINSON and others, Appellants, vs. OATWAY, Respondent.

April 27—May 24, 1910.

Appeal: Findings not supporting judgment: **Stare decisis: Obiter dicta:** ***Wills: Proof of execution: Signatures of deceased witnesses: Authentication.***

1. **Although a judgment is *prima facie* erroneous because the trial court failed to make any finding as to an essential fact, it may be affirmed on appeal if it is clear that justice has been done.**
2. **Such a judgment may be supported by an uncontradicted inference as to the essential fact, arising from evidentiary facts found.**
3. **Where the supreme court has persistently declared approval of a rule of law, though in cases where the point was not necessarily involved, such declaration should not be lightly ignored, especially when, in presence of conflicting decisions in other jurisdictions, it amounts to an adoption of the view of those courts approving the rule.**
4. **Proof of the authenticity of the signatures of deceased or necessarily absent attesting witnesses to a will *prima facie* establishes all facts essential to due execution to which the witnesses could depose if present, including the authenticity of testator's signature, whether autographic, by mark, or in the handwriting of another, also his volition in signing and his mental capacity and understanding of his act.**
5. **In such case the inference that testator executed the will with due understanding of its contents is not prevented or overcome by proof that he could not read or write the English language, qualified by the further facts that he had been in this country thirty years, had served in the Civil War, and was a prosperous farmer of average intelligence.**

APPEAL from a judgment of the circuit court for La Fayette county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Appeal from probate of alleged will of Christian Hawkinson, dated September 5, 1896, to which his name appears in the handwriting of the scrivener, Michael Doyle, who is also the first subscribing witness. The will bears a full attesta-

tion clause certifying, *inter alia,* the signing by Christian Hawkinson. His name as subscribed to the will is interrupted by a cross and the words "his mark." There is no bill of exceptions, and the court made certain findings of fact which in the main are mere recitation of the evidence. There is no finding of fact as to whether deceased was competent, as to whether undue influence was exerted upon him, as to whether he knew the contents of the instrument, nor as to whether he in fact signed the same by making his mark, or otherwise. It is found, however, that he died May 6, 1907; that his widow survived him about six months; that immediately after his death she made the usual petition for letters of administration, alleging intestacy; that on July 2, 1907, she, together with one of the daughters, petitioned for the probate of this instrument and filed it in county court; that Hawkinson was eighty-one years old at the time of his death, a native of Norway, came to this country before the Civil War, could read Norwegian but could not write it, and could neither read nor write English, was a prosperous farmer and of average intelligence; that the subscribing witnesses both died before testator; that their signatures are authentic; and that the whole document, other than the signature of the other subscribing witness, is in the handwriting of Michael Doyle, the first subscribing witness, who was a man of good standing, resided in the same village with the testator for many years before the date of the will, and was or had been a justice of the peace and drew conveyances and wills. As conclusion of law it is declared that the instrument is the last will and testament of Christian Hawkinson. From judgment affirming the order of the county court admitting the will to probate certain of the heirs at law of the deceased appeal.

For the appellants there were briefs by *Orton & Osborn,* attorneys, and by *J. H. Clary,* as guardian *ad litem,* and oral argument by *P. A. Orton* and *C. F. Osborn.* To the

point that mere proof of the signatures of the subscribing witnesses to a will was insufficient, especially where the will is signed by mark, they cited *In re Burbank,* 93 N. Y. Supp. 866, affirmed 185 N. Y. 559; *Peck v. Cary,* 27 N. Y. 9, 24; *Jackson v. Vickory,* 1 Wend. 406; *Jackson v. Le Grange,* 19 Johns. 386; *Jackson v. Luquere,* 5 Cow. 221; *Claflin's Will,* 73 Vt. 129, 50 Atl. 815; *Stephens v. Stephens,* 129 Mo. 422, 31 S. W. 792; *More v. More,* 211 Ill. 268; *Gould v. Chicago T. Sem.* 189 Ill. 282; *Hobart v. Hobart,* 154 Ill. 610; *Mead v. Presbyterian Church,* 229 Ill. 526; 1 Underhill, Wills, § 201; Dayton, Surrogates, 163; *Halstead's Estate,* 101 N. Y. Supp. 971; *Cottrell's Will,* 95 N. Y. 329, 338; *Sizer's Will,* 113 N. Y. Supp. 210; *Hyland's Will,* 27 N. Y. Supp. 961; *Kane's Will,* 20 N. Y. Supp. 123; *Smith's Will,* 15 N. Y. Supp. 425; *Jones v. Roberts,* 96 Wis. 427.

For the respondent there was a brief by *Carey & McDaniel,* and oral argument by *J. K. Carey* and *C. F. McDaniel.*

DODGE, J. The judgment is *prima facie* erroneous because not supported by the findings. Before a will can be admitted to probate and before there can properly be any conclusion of law that an instrument "is the last will and testament" of any one, it is essential that the court must be convinced that the testator signed it in the presence of witnesses and that they attested with the formalities prescribed by law. The trial court is required by statute to make written decision declaring his finding on this subject. *Young v. Miner,* 141 Wis. 501, 124 N. W. 660. Why the trial court should have refrained from performing this duty, or counsel entering the judgment should not have at least requested a finding on this vital question, essential to the record validity of their judgment, is not apparent. Nevertheless, however erroneous the procedure, we may refrain from revers-

ing a judgment based thereon if it is clear that justice has been done. *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363.

The concrete question is whether, upon proof of the authenticity of the signatures of deceased or necessarily absent attesting witnesses, there is a legitimate inference or presumption of fact that those acts which they purport to attest did occur. Those acts include the signing or acknowledgment by the testator in the presence of the witnesses, his declaration of his purpose, his request to the witnesses to attest, and their signing for that purpose in his presence and in presence of each other. It is undeniable that an affirmative answer to this question in its broadest scope has been repeatedly declared, in words at least, by this court. *Meurer's Will,* 44 Wis. 392, 399; *Lewis's Will,* 51 Wis. 101, 113, 7 N. W. 829; *Allen v. Griffin,* 69 Wis. 529, 536, 35 N. W. 21; *O'Hagan's Will,* 73 Wis. 78, 82, 40 N. W. 649; *Gillmor's Will,* 117 Wis. 302, 94 N. W. 32; *Hanley v. Kraftczyk,* 119 Wis. 352, 361, 96 N. W. 820; *Arneson's Will,* 128 Wis. 112, 116, 107 N. W. 21. However, it is also true, as appellant urges, that in none of those cases was the effect of such evidence to prove the fact of signing by the testator necessarily involved, because in each of them the fact was either undisputed or otherwise established. As a result the conclusiveness of such utterances is perhaps open to debate. But when the court of last resort has persistently declared approval of a rule of law, it should not lightly be ignored, especially when, in presence of conflicting decisions in other jurisdictions, such declarations amount to adoption of the views of those courts approving the rule. In the light of what has been said, are we justified in departing from the rule and policy of the past?

Appellant contends that our cases overlook the fact that in case of wills their validity and existence depend on two facts, namely, execution by the testator and attestation with certain formalities by witnesses. He insists that proof of the au-

thenticity of the witnesses' signatures justifies no inference further than that they wrote them with the proper formalities. In other words, that they merely attested. To this limitation are cited numerous very direct decisions by the New York courts. Such cases, however, are all predicated on statutes of that state to the effect that if subscribing witnesses are dead the will may be established on proof of handwriting of the testator *and* of the witnesses *and* under such circumstances as would be sufficient to prove the will on the trial of an action. This is held to require, in the conjunctive, proof of authenticity of both the testator's and the witnesses' signatures, and thus to limit the inference or presumption to the regularity of other acts. *Jackson v. Luquere,* 5 Cow. 221; *Jackson v. Vickory,* 1 Wend. 406; *Jackson v. Le Grange,* 19 Johns. 386; *Peck v. Cary,* 27 N. Y. 9; *Burbank's Will,* 104 App. Div. 312, 93 N. Y. Supp. 866, affirmed 185 N. Y. 559, 77 N. E. 1183. The New York cases seem to have been followed, without noticing the statute, in *Claflin's Will,* 73 Vt. 129, 50 Atl. 815, where, however, there was no decision that the testator's signature could not be presumed from the attestation. Certain other cases cited by appellant declare a presumption in favor of due execution to arise upon proof of authenticity of signatures of testator and witnesses, but do not expressly negative such presumption from witnesses' signatures alone. *Gould v. Chicago T. Sem.* 189 Ill. 282, 59 N. E. 536; *More v. More,* 211 Ill. 268, 71 N. E. 988; *Mead v. Presbyterian Church,* 229 Ill. 526, 82 N. E. 371. In one case not cited is declared necessity of proof of a maker's signature in addition. It seems to be merely a ruling by a justice on a trial, and not a decision on review or after deliberate consideration. *Collins v. Nicols,* 1 Harr. & J. 399. The decisions in New York are, by reason of their statute, of little or no weight in Wisconsin, where we have no statute to modify general rules of evidence in case of contested wills, sec. 3788, Stats. (1898), having no application.

Jones v. Roberts, 96 Wis. 427, 432, 70 N. W. 685, 71 N. W. 883. We have, therefore, to consider the effect of proof of authenticity of the signature of an attesting witness in case his presence or memory is not obtainable. It is not questioned that it supports *prima facie* an inference of the attestation required by will statutes. That is declared in cases cited by appellant and generally. 2 Wigmore, Ev. §§ 1505, 1511. Upon the question of the further fact of execution by testator, admissibility and effect are controlled by the rule that in absence of primary evidence the best evidence obtainable is admissible and must be produced. The ancient rule was that, when an instrument was attested, the best and only evidence was that of the attesting witnesses. When they were gone, after first doubting if the document could be proved at all (2 Wigmore, Ev. § 1287), it was concluded that their solemn act in joining by attesting contemporaneously the very instrument was admissible as their declaration of the facts therein declared expressly or by implication, under a relaxation of the anti-hearsay rule indulged in deference to necessity and in order that duly executed instruments might not frequently fail of proof. 2 Wigmore, Ev. §§ 1306, 1505, 1506, 1511; *Adam v. Kerr,* 1 Bos. & Pul. 360; *Losee v. Losee,* 2 Hill (N. Y.) 609; *Greenough v. Greenough,* 11 Pa. St. 489; *Clark v. Boyd,* 2 Ohio, 56; *Kirk v. Carr,* 54 Pa. St. 285, 290; *Boyeus's Will,* 23 Iowa, 354, 357; *Murdock v. Hunter's Rep.* 1 Brock. 135, Fed. Cas. No. 9,941; *Garrison v. Owens,* 1 Pin. 544. This view is held by the great majority of courts with regard to all documents bearing attestation whether required by law or not, and in many jurisdictions the view that the written attestation is the best evidence in absence of the witnesses has led logically to the holding that no other evidence of testator's signature is admissible. 2 Wigmore, Ev. § 1320. Such technical exclusion of other evidence of the authenticity of a grantor's or maker's signature has not been general, and

several courts have concluded that other proof of authenticity is superior to the hearsay declarations of witnesses to instruments not required by law to be attested. *Tagiasco v. Molinari's Heirs,* 9 La. 512; *Chaffe v. Cupp,* 5 La. Ann. 684; *Shiver v. Johnson,* 2 Brev. (S. C.) 397. As to wills, however, the rule seems to be general, except for the decisions above mentioned, that the attestation itself is *prima facie* proof of all facts essential to due execution, to which attesting witnesses could depose if present, including the authenticity of testator's signature, whether autographic, by mark, or in handwriting of another, also his volition in signing and his mental capacity and understanding of his act. *Hays v. Harden,* 6 Pa. St. 409, 412; *Greenough v. Greenough, supra; Barker v. McFerran,* 26 Pa. St. 211; *McKee v. White,* 50 Pa. St. 354; *Leckey v. Cunningham,* 56 Pa. St. 370; *Snider v. Burks,* 84 Ala. 53, 4 South. 225; *Stevens v. Leonard,* 154 Ind. 67, 76, 56 N. E. 27; *Carpenter v. Denoon,* 29 Ohio St. 379, 391; *More v. More,* 211 Ill. 268, 71 N. E. 988; *Scott v. Hawk,* 107 Iowa, 723, 77 N. W. 467; *Eliot v. Eliot,* 10 Allen, 357; *Nickerson v. Buck,* 12 Cush. 332; *Farleigh v. Kelley,* 28 Mont. 421, 72 Pac. 756; *Clarke v. Dunnavant,* 10 Leigh, 13; *Murdock v. Hunter's Rep.* 1 Brock. 135, Fed. Cas. No. 9,941; *Croft v. Pawlet,* 2 Strange, 1109; *Wright v. Tatham,* 1 Ad. & El. 3. In view of this array of authority and the reasons underlying it, we are not at all inclined to change the attitude of this court so long and so persistently declared, even though such declarations were not entirely necessary to decision of the cases wherein uttered.

An objection that a signature by mark is not within the general rule, but should be supported by further proof, is overruled by many of the cases cited. Under the reasons of the rule as stated, the attestation quite as much declares that the testator made the mark as and for his signature as that he wrote the letters spelling his name when that appears. Indeed some courts which would require further proof of the

authenticity of an apparent autograph hold it unnecessary for a mark, which has no individual characteristics, because of the impossibility of authenticating the latter by any but an eye-witness. *Howard v. Snelling,* 32 Ga. 195; *Shiver v. Johnson, supra; Tagiasco v. Molinari's Heirs, supra; Chaffe v. Cupp, supra.* The fact urged by appellant that testator could not read or write the English language, qualified by the further facts that he had lived in this country thirty years, served in the Civil War, and was a prosperous farmer of average intelligence, neither prevents, nor in our opinion suffices to overcome, the inference that he executed the will with due understanding of its purport. *Walter's Will,* 64 Wis. 487, 25 N. W. 538; *Arneson's Will,* 128 Wis. 112, 115, 107 N. W. 21.

Our conclusion is, therefore, that from the evidentiary facts found by the trial court arises *prima facie* an inference in favor of the ultimate fact that the deceased executed the will as required by law. Such inference, being without contradiction, constitutes a preponderance of evidence and therefore supports the judgment.

By the Court.—Judgment affirmed.

GRIFFITHS and another, Respondents, vs. CRETNEY and another, imp., Appellants.

SAME, Respondents, vs. JONES, imp., Appellant.

April 28—May 24, 1910.

Equity: Cancellation of instruments: Retaining jurisdiction to award damages: Exchange of property induced by fraud: Mental incapacity: Value of lands: Evidence: Joint wrongdoers: Appeal: Costs: Printing case.

1. Where, in an action to set aside a conveyance of lands on the ground of fraud, it appeared that one of the defendants had title to the lands when plaintiffs demanded a reconveyance, but before the action was commenced had, without plaintiffs' knowl-

edge, conveyed to other persons, so that no cancellation and rescission could be awarded, it was proper for the court to retain the action and award damages for the fraud.

2. Evidence in this case tending to show, among other things, impaired mental capacity and lack of business intelligence on the part of plaintiffs and that they reposed trust and confidence in one of the defendants, who had been their adviser and who chiefly brought about the exchange of lands in question, is *held* to sustain findings that the plaintiffs relied upon false representations as to the value of wild lands taken by them in exchange for their farm and were induced thereby to make the exchange, and that they were incompetent to transact the business and did not fully comprehend it.

3. The preponderance of evidence, including conflicting opinions of witnesses, as to the value of certain wild lands is *held* to show that at the time in question they were worth $12 per acre, instead of $6 and $8 as found by the trial court.

4. It appearing that two of three defendants who had exchanged lands for plaintiffs' farm were partners dealing in real estate and had induced the third defendant to exchange his farm for an interest in that of the plaintiffs; that he put his farm into the exchange at a fair price and did not participate in or know of the false representations made by the other defendants as to wild lands which they put into the deal and in which he had no interest; and that he afterwards paid his codefendants full consideration for their interest in the plaintiffs' farm, it is *held* that such third defendant was not a joint wrongdoer with the others so as to be liable for the damages resulting from the fraud.

5. Costs are not allowed in this case for the printing of a case and briefs which violate Supreme Court Rule 6.

APPEALS from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Plaintiffs bring this action alleging that defendants, through misrepresentation and undue influence, fraudulently obtained an exchange of properties on September 12, 1905, and praying for cancellation of their deed of transfer of their farm to the defendants, for a reconveyance thereof to them by the defendants, and for damages in the sum of $1,000.

The plaintiffs are farmers who were born and raised on the farm of 193 acres which they acquired from their father

at his death and to which they added 168 acres. They were unmarried, and as partners, under the name of Griffiths Bros., farmed these 361 acres of land. For a period of years they raised blooded stock and ran a thresher, a sawmill, and a shredder. The principal business transactions of the firm were carried on by *William T. Griffiths,* the elder of the brothers. *John* at times attended to some of the smaller business dealings of the firm. In 1900 their property was worth about $30,000, consisting of the farm, worth $27,000, $14,600 in the bank, their stock, and personal property. They were then in debt in about the sum of $12,000. The defendants *Cretney* and *Collins* are partners and are in business as dealers and brokers in real estate. The defendant *Jones* is a farmer and dealer in real estate.

In 1895 or 1896 *William T. Griffiths* had an attack of nervous prostration. Morphine was administered to him to relieve him from pain, and he became addicted to its use. In 1905 he was accustomed to take five or six grains of it three times a day. After such nervous attack he was weak and infirm of body and unable to do hard work. There was evidence of the effect of morphine upon him and that he was of much less mental power than he was before his illness; that he had at times wandered from home unconscious of where he was going, unmindful of what was occurring about him; that at times he was in a dreamy state of mind; that he did not remember having paid accounts, and at one time attempted to pay an account twice. The court, who observed him at the trial and on the witness stand, at the close of the testimony, speaking of his condition, stated:

"The effect of the morphine habit upon him is manifest from observing him. The twitching of his hands, the twitching of his face, his constant motion, the closing of his eyes, has been continuously apparent while he has been in court. A casual observer would assume that he was incapable of doing anything that required intellectual effort. But upon the witness stand he has seemed quite bright, and much of his

talk has been connected, and his memory in reference to many transactions has been good. On the whole, however, his testimony has not been satisfactory, in this: he has not been able to give a lucid account of any particular transaction from beginning to end. His own testimony shows, and I do not doubt it, that when he is not under the influence of morphine he is listless and incapable of effort, and under the influence of morphine he feels much better and when interested in a subject seems bright—is bright and talks intelligently. The testimony in this case convinces me, coupled with the observation of the man, that in this business transaction now under consideration he did not have a clear comprehension of the situation."

John Griffiths, the other plaintiff, as above stated, had but little to do with the management of the large and important business of the firm. The evidence shows that he cared for the stock, attended to the running of the thresher, and performed manual labor connected with their business. In 1898 he lost an arm in a shredder, and on this account was thereafter less active as a worker. It is clear from the evidence that their business was managed by his brother. The court concluded as to him thus:

"I am satisfied from the testimony in this case and from my observation of the parties that *John Griffiths* is a man of hardly ordinary business intelligence—a man who has done very little of the business of the Griffiths Bros."

The plaintiff *William T. Griffiths* testified that he became intimate in a business way with the defendant *Collins* in 1903. At that time they went together to Bruce, Wisconsin, and together purchased some property. This property was afterwards sold by *Collins,* and most of the proceeds belonging to the plaintiffs were paid by *Collins* on their indebtedness. This plaintiff also testified that the plaintiffs had been partners with the defendant *Collins* in the several purchases of property and that they had not as yet received any of the profits from the sale of these properties. One transaction in land in the northern part of the state had netted $200 in com-

mission which was still wholly retained by *Collins*. Plaintiffs obtained a land contract on some lands in Canada as partners with *Collins* on the latter's recommendation, and he obtained commissions which he retains. This witness also testified that they had purchased a farm of about 200 acres in Rusk county because *Collins* recommended and advised him to do so. The defendant *Collins* denies that there ever was a partnership between him and the plaintiffs except as to the property at Bruce, Wisconsin. At the time of the exchanges of properties in question plaintiff's farm was listed with *Collins* and *Cretney* for sale.

The evidence tends to show that after 1900 the business operations of the plaintiffs were not successful, and that at the time the transactions took place between them and the defendants they had become financially embarrassed. In September, 1905, the incumbrance upon their farm had become $15,500; their money in the bank had been spent and they were in debt for some machinery; a creditor had obtained judgment for some $700 for feed furnished to them and had seized upon execution and taken from their farm blooded stock worth $3,000 or $4,000. *William T. Griffiths* had tried to borrow money to meet their obligations, but had been unsuccessful. The condition of the plaintiffs was known to the defendants.

On the morning of September 12, 1905, the plaintiff *William T. Griffiths* had gone to see the creditor who had taken some of their stock on execution to satisfy his judgment against the plaintiffs. Meanwhile the defendants had been talking with the plaintiff *John Griffiths* regarding this exchange of properties and arranged with him to meet with the plaintiff *William T. Griffiths* after dinner, at a bank in the city of Dodgeville. They so met, and late in the afternoon an agreement was reached for a transfer of properties. Plaintiffs transferred by deed their farm at the agreed price of $27,000 and were to receive an equivalent for the value

of their equity therein above the $15,500 incumbrance, in property and cash. In exchange they were to receive a farm in Rusk county of an agreed value of $11,000, upon which there would be an incumbrance of $5,500; 160 acres of wild land in Barron county at $20 per acre; 120 acres of wild land in Rusk county at $20 per acre; the payment of $1,000 on the plaintiffs' contract for Canadian lands; $360 in cash; and a loan of money in settlement of the judgment for $700.

The plaintiffs testified that the defendants represented to them that the wild lands in Rusk and Barron counties had been acquired by them at the price of $20 per acre, and that the lands were of that value, and unless they accepted the wild lands at this price all negotiations would have to be dismissed and abandoned. Plaintiffs also testified that it was understood that the defendant *Collins* was to go with the plaintiffs to inspect these wild lands before March 1, 1906, in order to verify his representations respecting their nature and value, and that he has failed and refused to do so. Defendants now insist that the exchange of properties was effected and fully executed and the deeds and transfers were delivered in September, 1905, but claim that each of the parties was to pay the interest on the incumbrances on the lands transferred by them up to March 1, 1906.

The deed to the defendants was placed on record the next day. The deed to the plaintiffs of the improved farm was sent to Rusk county to be recorded. The judgment against the plaintiffs was satisfied. The plaintiffs received $360 in cash, and a deed to the wild land in Rusk county was executed by the defendants *Cretney* and *Collins* in favor of the plaintiffs. The title to the improved farm in Rusk county was owned by the defendant *Jones*. The title to the wild lands in Rusk county was owned by the other defendants, and they also had a land contract upon the lands in Barron county. No transfer to the plaintiffs of the lands in Barron county was executed until after March 1, 1906. *Jones* had given full consideration to the plaintiffs for the one-half in-

terest in their farm, and the proof shows that he subsequently had paid full consideration when he secured the interests of the other defendants in the plaintiffs' old farm. He has thus transferred property to the plaintiffs or to the other defendants, or has paid money to secure this farm, amounting to about $27,000. It appears that the defendant *Jones* is very deaf, probably did not hear what was said at the bank regarding the value of the wild lands, and that he has transferred part of the farm obtained from the *Griffiths*. He testified that he had no knowledge of the value of wild lands; that he heard such lands were to be taken in the exchange at $20 per acre; that he had been up in Rusk county with *W. T. Griffiths;* and that such lands were selling at $20 per acre. The evidence introduced by the plaintiffs as to the value of the wild lands was in effect that they were worth nothing for tillage purposes, but that they had a pasturage value in connection with farm lands. Witnesses were called in plaintiffs' behalf who gave opinion evidence that the lands in Rusk county were worth at a maximum $8 per acre, and that the lands in Barron county were worth $6 per acre. On behalf of the defendants the opinion evidence was that the wild lands were worth $20 per acre.

The trial of the case was had at the March, 1907, term of the circuit court. At the conclusion of the evidence the court announced as his conclusion from the facts and the evidence adduced that it was a question whether rescission could be awarded. He therefore, at the September term of the court, made an order appointing a referee to take proof as to the rents and profits. On December 24, 1907, the court denied a motion that the scope of the inquiry before the referee should be broadened and that defendants should be allowed to take proof of the value of the wild lands. During the month of January, 1908, the referee took evidence, including evidence offered by the defendants as to the value of the wild lands.

At the June, 1908, term of the court the final decision was

announced, the court stating that the referee had improperly included in his report opinion evidence upon the value of the wild lands, but that he had read and considered it. This evidence was that these lands were worth from $12.50 to $25 per acre. The court held that rescission could not be awarded, and allowed the plaintiffs $3,660 as damages, holding that the amounts agreed upon as the value of the wild land were excessive, that the Barron county land was worth $6 per acre and the Rusk county land $8 per acre; that the plaintiffs were incompetent to transact the business and did not fully comprehend it; and that they had been induced to make the exchange of land because of the wilful misrepresentations by defendants as to the value of the wild lands. These are appeals from the judgment.

For the appellants *Cretney* and *Collins* there were briefs by *J. P. Smelker* and *Fiedler & Fiedler,* and oral argument by *Mr. Smelker.*

Aldro Jenks, for the appellant *Jones.*

For the respondents there were briefs by *Platt Whitman* and *James E. O'Neill,* and oral argument by *Mr. Whitman.*

SIEBECKER, J. It is urged that the court erred in retaining jurisdiction of the cause to award plaintiffs damages after determining that a judgment for a rescission of the deeds and transfers of the lands involved could not be awarded as prayed for by the plaintiffs. The appellants' contentions embrace two questions: first, Is the case one which the court may retain if rescission could not be awarded, and grant relief by way of damages; secondly, Do the facts and circumstances shown present a case for an award of damages? As to the first question, the practice is well established that when a court of equity has obtained jurisdiction in a suit for cancellation of instruments transferring interests in lands, and it is disclosed by facts elicited on the trial that the special relief prayed for has become impracticable and that plaintiffs

are entitled only to the alternative relief of damages, the court may retain the cause to do justice between the parties. This practice was adopted and the rule applied in *Hall v. Delaplaine,* 5 Wis. 206; *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532; and *Lindsay v. Fricke,* 130 Wis. 107, 109 N. W. 945.

It is undisputed that the defendant *Jones* had title to the lands at the time plaintiffs demanded a reconveyance thereof on account of the alleged fraud. It furthermore appears that *Jones* thereafter conveyed title to 160 acres of the farm to third parties, and hence no cancellation and rescission could be awarded. It does not, however, appear that plaintiffs knew that the defendants *Collins* and *Cretney* had conveyed their interests to the defendant *Jones* and that *Jones* had conveyed title to a portion of the land to a third person before the commencement of this action, and therefore the court retained the cause to award plaintiffs damages to compensate them for the losses sustained through the fraud found. The action of the court, under the circumstances of the case, was proper within the rule of the foregoing decisions.

It is contended by the defendants that the trial court erred in finding that they falsely and fraudulently misrepresented the value of the wild lands in Barron and Rusk counties, that such false and fraudulent representations were intentionally made by defendants to deceive the plaintiffs in this respect and with the object and intent to induce plaintiffs to make the exchange of properties as effected in the transaction under investigation, and that the plaintiffs relied thereon and were thereby misled to their damage in the sums found.

The evidence abundantly establishes the court's conclusion that *William T. Griffiths* was addicted to the morphine habit and that his indulgences therein had seriously affected his mind and memory and had very much impaired his capacity and ability for the transaction of business. On this subject

the court declares that as to him, "the testimony in this case convinces me, coupled with the observation of the man, that in this business transaction now under consideration he did not have a clear comprehension of the situation." As to the brother *John* the court states: "I am satisfied from the testimony in this case and from my observation of the parties that *John Griffiths* is a man of hardly ordinary business intelligence—a man who has done very little of the business of the Griffiths Bros."

The facts disclosed on the trial tending to show that plaintiffs supposed they had made no transfer of their farm in the September, 1905, transaction, though it is undisputed they executed a deed which was recorded the next day and apparently with their consent, are cogent and persuasive as circumstances supporting the trial court in his conclusions as to plaintiffs' mental capacity and their want of ability to comprehend and understand the full import and consequences of this transaction for the disposition of their farm. It also appears that *Collins* had for a long time been their adviser in business affairs and in selling and buying land for them, and that they reposed trust and confidence in him as a promoter of their financial interest. These relations existed at the time of the exchange of properties on September 12, 1905. The acts and conduct of plaintiffs in dealing with defendants on the occasion in question, which was in the main brought about through and by *Collins,* must be considered in the light of all these existing conditions respecting plaintiffs' abilities and capacities and their friendly relations to *Mr. Collins.* A study and consideration of the evidence in support of the facts embraced in the foregoing statement leads us to the conclusion that the plaintiffs on the occasion in question relied on the statements of defendants, principally made by *Collins,* respecting the properties embraced in the exchange, the values thereof, the terms and conditions to provide for payment of the moneys coming to them thereon,

as well as the loan from them to obtain a discharge of the execution levy on their stock. It is also manifest that their reliance on the truth of all the representations made to them concerning the properties induced them to make the exchange, and that they did not fully comprehend that the execution and delivery of the deed to their premises, under the accompanying facts and circumstances, operated as a consummation of the transfer of the properties embraced in the exchange and effectually transferred their title and interest in the former.

The appellants advance the argument that the facts and circumstances of the transaction through which the exchange was accomplished fail to show that their conduct in the matter was naturally calculated to deceive and mislead the plaintiffs. If plaintiffs were men of ordinary intelligence and had ordinary business capacities and abilities, this claim would be well founded; but, as above stated, plaintiffs are not such men and had not the ability to deal with the defendants in an adversary character on an equal footing for protecting their rights in the transaction. The situation was one peculiarly favorable to enable the defendants to mislead them by slightly colored false statements and thereby overreach and cheat the plaintiffs. Reading the case from this viewpoint, we are persuaded that the evidence justifies the trial judge's conclusions to the effect that the plaintiffs relied on the statements and representations of *Collins* respecting the wild lands in Barron and Rusk counties and were thereby induced to believe they were of the value of $20 per acre, and that they accepted them as of that value in the exchange of properties.

It is urged that the trial court deprived the defendants of an opportunity to show the actual value of the wild lands, and that the court's finding of their value is against the clear preponderance of the evidence on this subject. Complaint is made that the defendants were deprived of an opportunity to

furnish proof of the actual value of these wild lands, and that this resulted through the error of the court in refusing to direct the referee to take proof on this subject after the conclusion of the trial on the issues of fraud. It is sufficient to say that the court's refusal to make the requested order for the taking of evidence on this subject did not prejudice the defendants, since the referee in fact received and reported defendants' evidence thereon to the court, and the court considered it, as declared by him in his oral statement of his final decision. We shall therefore treat the evidence as received and as before the court. The trial court found the Barron county wild land was of the actual value of $6 per acre, and that in Rusk county $8 per acre, and that the plaintiffs' farm and the Kelly farm were of the value, fixed by the parties at the time of negotiations, of $27,000 and $11,000, respectively. It is urged that this value of the plaintiffs' farm is too high by $3,600. The opinion of witnesses familiar with this land and the value of such property sustains the value fixed by the parties and found by the court. We do not find that this value thus found is against the clear preponderance of the evidence, and it cannot be disturbed.

The appellants strenuously contend that the actual value of the wild lands was not misrepresented by them and that no fraud was perpetrated upon the plaintiffs, as they claim, and therefore plaintiffs were not injured in the transaction. The evidence on this subject is in irreconcilable conflict. The witnesses called by the plaintiffs expressed their opinion that the actual value was from four fifths to two thirds less than the price fixed in the exchange, while the opinion of defendants' witnesses placed a much higher value on them and varied as above stated. From the evidence adduced it is clear that the lands had but very slight, if any, tillage value. The witnesses whose opinions were based on such considerations, if we take into account the character and availability of these lands for agricultural purposes, tend to sustain the court's finding, while those witnesses who exhibited famil-

iarity with land prices for trading and agricultural purposes in these communities through their business as real-estate brokers and agents placed values thereon which sustained defendants' contentions. We are persuaded, after a painstaking search into the probative force of the evidence on the subject of the value of these lands, that the extremes of the opinions respecting such values do not furnish a sufficiently reliable estimate for the court to follow. We are also of the opinion that the trial court's finding of the value of these lands is not sustained by the clear weight of the evidence and that the proof clearly preponderates in favor of a higher value. This we conclude upon consideration of all the data as to their location, kind, quality, and general nature and availability as marketable properties under the facts shown. Under these facts and conditions the trial court should have found that the evidence reasonably preponderated to show that these lands had a value of $12 an acre and that they should be so valued in arriving at the damages sustained by the plaintiffs through the misrepresentations on this subject.

The defendant *Jones* defends on the ground that he has in no way participated in the alleged fraudulent representation concerning these wild lands and was in no manner connected with the transaction as to make him jointly liable for the fraud found by the trial court. It appeared that the defendants *Cretney* and *Collins* were partners engaged in the real-estate business; that they solicited *Jones* to make an exchange of his Rusk county farm for an interest in the plaintiffs' farm; that he agreed to such an exchange and put his farm into the deal at a fair value; and that he received in return no more than its equivalent as a consideration. It also appears that he had no interest in the wild lands and that he did not in fact know or claim to know their value. The evidence furthermore discloses that he made no representation to plaintiffs of their value and heard very little, if anything, of the misrepresentations made by *Collins* in negotiating the trade. Under the circumstances there is nothing

to show that he participated or co-operated in any fraudulent conduct which induced the plaintiffs to make the exchange of properties. The fact that the title was taken in the name of himself and *Cretney* and *Collins* is readily explicable as appropriate for subsequent adjustment of the mutual rights of the defendants. We find nothing in the record tending to show that *Jones* participated in the fraudulent conduct of *Collins* and *Cretney* or knew that such a fraud was being perpetrated on the plaintiffs. It is clear that he, under the circumstances, cannot be treated as a joint wrongdoer and be held liable for the damages resulting from the fraud. As to him the action should have been dismissed. The defendants *Collins* and *Cretney* were properly held for the resulting damages. The amount awarded we consider to have been excessive and must be reduced accordingly. In computing the damages the wild lands should be rated at $12 per acre instead of $6 and $8, respectively, for the Barron and Rusk county tracts as allowed by the trial court.

Supreme Court Rule 6 requires that the printed case shall contain an abridgment of the record so far as necessary to present the question for decision, and the evidence must be so abridged in narrative form. The case and the briefs of the defendants *Collins* and *Cretney* violate this rule, and they thereby forfeit their right to recover costs for printing them. See *Johanson v. Webster Mfg. Co.* 139 Wis. 181, 120 N. W. 832; *Skow v. G. B. & W. R. Co.* 141 Wis. 21, 123 N. W. 138; *Gerbig v. Bell, post,* p. 157, 126 N. W. 871.

By the Court.—The judgment is reversed, and the cause remanded with directions to enter a judgment dismissing the action as to *Thomas H. Jones*, and to award plaintiffs damages in the sum of $2,220, with interest against the defendants *A. T. Cretney* and *Joseph Collins;* no costs to be allowed appellants for the printing of the case and the printing of briefs of *Cretney* and *Collins.*

GERBIG, Respondent, vs. BELL, Appellant.

April 28—May 24, 1910.

Trespass: Cutting of timber: Aiding and abetting: Vendor and purchaser: Disputed boundary: Judgment: Conclusiveness: Title to land: Dismissal of action: Costs: Appeal: Printed case.

1. One who sells and conveys the timber on his own land is not liable for a trespass upon adjoining land committed by the purchaser while removing such timber, unless he aided and abetted the commission of such trespass.
2. Where the vendor of timber on certain land told the purchaser that a fence had been built on what he supposed was the west boundary but that the purchaser should have the line surveyed and satisfy himself, and the purchaser afterwards employed a surveyor who found that the fence was substantially on the true line, the fact that the vendor was present when the survey was made and, with others, shared the expense thereof because he wished to know where the line was, would not, if he acted in good faith, render him liable for a trespass by the purchaser in cutting to the line of the fence, which was not the true line.
3. Nor could such vendor be deemed to have aided and abetted such trespass merely because, when sued therefor, he denied in his answer that any trespass had been committed, and upon the trial sought to show that the line surveyed was correct.
4. While a final judgment is conclusive as to issues arising on the pleadings which were or might have been litigated, it does not, in itself, necessarily determine what was litigated or how each particular question was decided; and the facts in that regard may be shown by the findings, by the verdict, by the bill of exceptions, or by extrinsic evidence.
5. Thus, in an action for trespass to land, where defendant denied plaintiff's ownership and the jury found that plaintiff owned the land but that defendant did not trespass thereon, a judgment dismissing the complaint would not have the effect to deprive the plaintiff of his land, but on the contrary would be conclusive as to his ownership; and such judgment in the case would be proper.
6. Costs for a printed case violating Supreme Court Rule 6 are disallowed under Rule 44.

KERWIN, SIEBECKER, and TIMLIN, JJ., *dissenting*, are of the opinion that the evidence shows that the vendor of the timber

aided and abetted the commission of the trespass in cutting to the line of the fence mentioned; and that, even if that were not so, upon the pleadings and the finding of title to the disputed strip in plaintiff the latter was entitled to judgment for nominal damages and costs.

APPEAL from a judgment of the circuit court for Juneau county: J. J. FRUIT, Circuit Judge. *Reversed.*

The plaintiff brought suit to recover the value of some logs and timber alleged to have been wrongfully cut and removed from his lands. The defendant denied that any trespass was committed upon the lands of the plaintiff, and set up as a separate defense that, if any timber was cut upon plaintiff's lands, it was cut without the knowledge, authority, or direction of the defendant, by one Blakeslee, to whom the defendant sold the timber on certain parcels of land owned by him and adjoining those of the plaintiff. The answer also set up some facts tending to show that the plaintiff was estopped from claiming any recovery against the defendant because of the alleged trespass. The jury by a special verdict found that Blakeslee cut and removed certain timber from the lands of the plaintiff, but also found that the defendant did not aid, abet, counsel, or advise Blakeslee to cut the timber beyond the true boundary line between the lands of the plaintiff and the defendant. The value of the standing timber so cut and removed was found to be $12.50, and that the highest market value of the logs into which such timber was cut was $25. Judgment was rendered on this verdict in favor of the plaintiff and against the defendant for $12.50 damages and $272.06 costs, from which judgment this appeal is taken.

J. T. Dithmar, attorney, and *Daniel H. Grady,* of counsel, for the appellant.

James A. Stone, for the respondent.

BARNES, J. The defendant owned the S. W. ¼ of the N. W. ¼ and the N. W. ¼ of the S. W. ¼ of section 32. The

plaintiff owned the adjoining forties immediately west thereof in section 31. Defendant sold and conveyed the timber on thirteen parcels of land owned by him, including that on the two parcels above described, to one Blakeslee. The latter, while removing said timber, cut some trees on the land of the plaintiff. Judgment has been recovered against the defendant for such trespass.

The defendant had the right to sell and convey the timber which he owned. If he is liable for the trespass committed by Blakeslee, it must be because he aided and abetted in the commission of it.

The jury found that the defendant did not aid, abet, counsel, or advise Blakeslee to cut the timber to the west of the true boundary line. The court set this finding aside. The evidence to sustain it appears to us to be not only ample, but practically uncontradicted. The plaintiff had caused a survey of the land to be made some time before this transaction took place, and had built a fence on the line of his survey, but not along its entire length. Blakeslee cut the timber to this line. The defendant testified that he never pointed out his west line to Blakeslee nor told him where it was; that he told him there was a fence on the west side which he supposed to be the line; that Blakeslee wanted defendant to show him the line, but he told him he would have to get a surveyor, which he did; that he did not tell Blakeslee the fence was the line and that he would stand by it; that he never pointed out to Blakeslee the timber he sold him; that he stayed with him while the line was being surveyed, and contributed to the cost because he wanted to know where the west boundary of his land was; that at no time did he point out to Blakeslee in any way, shape, or form the lines which would limit his operations; and that he never cut or removed any timber from the disputed strip himself.

The testimony simply amounted to this: Defendant conveyed the timber on two government descriptions in section

32 as well as on other lands. He told his vendee that plaintiff had built a fence which he supposed formed the west boundary line of said parcels, but he did not know, and that the purchaser should have the line surveyed and satisfy himself. Blakeslee, after he made the purchase, employed a surveyor, who found that the fence substantially formed the true boundary line, and defendant was present when the survey was made and contributed to the expense thereof because he wanted to know the correct boundary line of his land. Two other parties besides *Bell* and Blakeslee also contributed to the expense. Each of the parties so contributing had a separate and distinct purpose in view, and that was to ascertain the correct boundary of his own property. We are unable to see how such a course of conduct could be construed as rendering the defendant liable as an aider and abettor of Blakeslee in committing the trespass which he did commit. There is nothing to show that defendant attempted to influence the judgment of the surveyor in reference to his survey. He claimed on the trial that the line established was the true boundary line, but this he had a perfect right to do. As owner of the land to the east of the disputed line he had a right to offer evidence as to the location of the true line. Such evidence was competent and proper on the question as to whether Blakeslee committed a trespass. By offering it the defendant neither aided nor abetted the trespass committed by his vendee. The timber had then been cut several years. He had a right to participate in the cost of the survey because he was interested in knowing the location of his west boundary line. He could hardly be convicted of a trespass on this account. It was immaterial to the defendant where the line was located in so far as it affected the timber. That had already been sold by him, and the location of the line could neither add to nor subtract from the amount which he had received therefor. If the surveyor was mistaken, and Blakeslee committed trespass by cutting to his line, it is dif-

ficult to see how the defendant thereby became a wrongdoer. If he was a wrongdoer, then the other parties who shared in the cost of the survey with Blakeslee and the defendant were likewise trespassers and liable. The making of the survey did not constitute the trespass complained of. It was a perfectly lawful and an obviously necessary act. If it was not correct, those who relied on it, and thereby injured their neighbors, would become trespassers, but not those who innocently participated in making it for their own information. The employment in good faith of the surveyor was not a trespass on the part of any one. It was Blakeslee's legal duty, under the circumstances disclosed by the testimony, to have the line surveyed. Had he failed to do so, and cut on plaintiff's land, he might well be held for a wilful trespass. Sec. 4269, Stats. (1898); *Brown v. Bosworth,* 58 Wis. 379, 17 N. W. 241; *Underwood v. Paine L. Co.* 79 Wis. 592, 48 N. W. 673. If Blakeslee had an unlawful purpose in view, it would not follow that the others who shared in the expense of the survey were liable if they acted innocently. In *Richardson v. Emerson,* 3 Wis. 319, 321, it is said:

"Where several persons are engaged in the accomplishment of a lawful object, if one or more shall become a tortfeasor, even with a view to aid such purpose, the others, who neither direct nor countenance such tortious acts, are not liable."

We fail to see how any significance can be attached to the fact that the defendant sought to establish on the trial that no trespass had been committed on plaintiff's land. The two defenses interposed were not repugnant. So long as they were not, the defendant had the right under the Code to rely on any defense that would defeat the plaintiff's action. Sec. 2657, Stats. (1898); *South Milwaukee B. H. Co. v. Harte,* 95 Wis. 592, 70 N. W. 821; *Roberts v. Decker,* 120 Wis. 102, 97 N. W. 519; *J. H. Clark Co. v. Rice,* 127 Wis. 451, 457, 106 N. W. 231. He would not commit a tort by so doing. It would be far-fetched to hold that, because the

defendant denied in his answer that any timber had been cut on the land of the plaintiff, and so contended on the trial, he therefore aided and abetted in the commission of a trespass done thereon over four years before the answer was made. Judgment should have been rendered on the verdict for the defendant on the trespass issue.

Some question has arisen as to the form of judgment which should be entered. The answer puts in issue the plaintiff's title to the disputed strip. The plaintiff has prevailed on such issue. Should the judgment go in favor of the plaintiff, with nominal damages, because he has succeeded in establishing his title, or should it go for defendant because he did not commit any trespass? The answer to this question determines which party should recover costs, and the costs recovered are more than twenty times the amount of the damages awarded. If a judgment for defendant dismissing the complaint would have the effect of depriving the plaintiff of the parcel of land in controversy, then it should not be entered, because it would be contrary to the finding of the jury. But we do not think it would have any such effect. The action is one to recover damages for a trespass for cutting and removing timber, not to establish title to real estate. Whatever judgment is rendered in the action is final as to the rights of the parties as to the cause of action litigated. It would not necessarily be final as to any other or different cause of action between the parties. As to such a cause of action it would be final only as to questions actually litigated. The ascertainment of what questions have been litigated in an action presents pure questions of fact which are not necessarily established by the pleadings and judgment, but which may be shown by the findings of the court or a referee, by the verdict, by the bill of exceptions, or by extrinsic evidence, as well as by the pleadings and judgment. The issue of title having been raised by the pleadings and having been litigated, and the jury having found in plaintiff's favor thereon, such

finding is conclusive as to the rights of the parties. This is just as true under a judgment dismissing the complaint because no trespass was proven, as it would be if judgment went in plaintiff's favor. In trials it frequently happens that the litigant who recovers judgment is defeated on certain issues that are tried. As to any issue that is tried and determined by the finding of a court or the verdict of a jury, the final judgment rendered sets the question at rest. In a subsequent action to try title to the land the court would inquire what issues were raised and tried in the trespass suit and how such issues were decided, and, as to such issues as were decided, the former action would be conclusive. The verdict rendered in the case before us would conclusively show that the plaintiff owned the disputed strip and that the defendant did not commit any trespass thereon. *Grunert v. Spalding,* 104 Wis. 193, 213, 80 N. W. 589, and cases there cited; *Emmons v. Dowe,* 2 Wis. 322; *Murphey v. Weil,* 92 Wis. 467, 66 N. W. 532; *Morgan v. C., M. & St. P. R. Co.* 83 Wis. 348, 53 N. W. 741; *Fulton v. Pomeroy,* 111 Wis. 663, 87 N. W. 831; *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1; *Moehlenpah v. Mayhew,* 138 Wis. 561, 577, 119 N. W. 826. While a final judgment is conclusive as to issues arising on the pleadings which were or might have been litigated, it does not in itself necessarily determine what was litigated or how each particular question was decided.

The printed case is not "an abridgment of the record so far as necessary to present the questions for decision" that are involved on the appeal, as required by Rule 6 of this court. It is far from it. A case containing twenty pages might well present all of the record that should have been printed. The case contains 142 pages including the index. Under Rule 44 of this court the appellant is not entitled to any costs for printing such a case. *Griffiths v. Cretney, ante,* p. 143, 126 N. W. 875; *Swanke v. Herdeman,* 138 Wis. 654, 120 N. W. 414; *Sparks v. Wis. Cent. R. Co.* 139

Wis. 108, 120 N. W. 858; *Steinberg v. Salzman,* 139 Wis. 118, 120 N. W. 1005; *Johanson v. Webster Mfg. Co.* 139 Wis. 181, 120 N. W. 832; *Herring v. E. I. Du Pont de Nemours P. Co.* 139 Wis. 412, 121 N. W. 170; *Keeley v. G. N. R. Co.* 139 Wis. 448, 121 N. W. 167; *Neale v. State,* 138 Wis. 484, 120 N. W. 345; *Roach v. Sanborn L. Co.* 140 Wis. 435, 122 N. W. 1020.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to reinstate the answer of the jury to the third question in the special verdict and to render judgment on the verdict rendered by the jury, dismissing the complaint because the plaintiff failed to prove a cause of action in trespass. The clerk is directed not to tax any costs for printing the case.

KERWIN, J. (*dissenting*). Error is assigned in the charge, in allowing costs to plaintiff and in changing the answers to questions Nos. 2 and 3 of the special verdict. The jury found:

"(2) Did the plaintiff by his conduct and by the erection of the fence, as shown by the testimony, on the easterly side of his land, lead the parties cutting the timber to believe and rely upon the same as the true boundary line between the parties hereto? *A.* Yes.

"(3) Did the defendant, *Bell,* aid, abet, counsel, or advise Blakeslee to cut the timber to the west of the true boundary line between the lands of these parties? *A.* No."

The court changed the answer to question No. 2 from "Yes" to "No," and the answer to question No. 3 from "No" to "Yes." The majority opinion is based upon the propositions that the answers to questions Nos. 2 and 3 were well supported by the evidence and that it was error to change them, and that upon the record the defendant was entitled to recover. It is settled by the verdict that the disputed tract where the timber was cut belonged to the plaintiff, and that question is not contested here. In my opinion, upon the

undisputed evidence the court below was warranted in changing the answers to questions 2 and 3 of the verdict. The following evidence is undisputed: In 1894 Patterson made a survey for plaintiff, and plaintiff constructed a fence, to accommodate his cattle, of two or three wires attached to trees and some posts and not straight, upon the Patterson line, at some points on one side and at others on the other side of the line between sections 31 and 32, but not the whole length, there being a gap of something like forty rods; that plaintiff always claimed that this fence was not on the line and at some points cut timber and occupied the land east of it; that defendant, *Bell,* knew this when he sold the timber in question to Blakeslee, and, after the sale to Blakeslee, defendant, Blakeslee, Stickney, Moe, and Biers joined in a survey, each paying one fifth of the expense, for the purpose of determining the line; that the plaintiff also after the sale of the timber to Blakeslee procured a survey and established what is known in this case as the Keach line and which the jury found to be the true line between sections 31 and 32; and that this line brings the timber cut upon the land of plaintiff and east of the Patterson line. In speaking of the sale of the timber to Blakeslee defendant testified:

"He asked me where the line was, and I told him there was a fence on the west side. . . . I told him that that was supposed to be the line. I told him the farm was fenced except around this government forty, the southwest quarter of the southwest quarter of 32."

Defendant further testified that at the time he made the contract with Blakeslee he told him there was a fence on the plaintiff's east line, but told him he did not know it was on the line; that when he sold to Blakeslee he claimed to the fence and claimed it up to the time of trial, to the line as surveyed by Patterson. When defendant bought his land plaintiff had a fence on part of the line, but was cultivating land east of it. Defendant testified that plaintiff

never told him before the surveys of Kennedy and Barney where his line was. The Kennedy and Barney survey was after the timber was cut. Defendant testified that he relied upon the Patterson survey as his line. Defendant's land adjoining plaintiff's land had never been inclosed. Before defendant entered into the contract with Blakeslee he went upon the land with him and told Blakeslee there would have to be a survey for the purpose of freshly determining where the several lines stood at the time. Defendant and Blakeslee had a survey made before the timber was cut which adopted the Patterson line. From an examination of the evidence I am convinced that the court below was right in changing the answers to questions 2 and 3.

The second question relates to estoppel on the part of the plaintiff by his conduct. But the evidence establishes without dispute that the defendant or Blakeslee did not rely upon the fence or the conduct of plaintiff. The line was in dispute and known to all parties to be in dispute. Defendant and Blakeslee obtained a survey and stood upon it. Plaintiff also procured a survey and insisted upon it as the true line and the jury held with plaintiff. There is no evidence that defendant or Blakeslee was misled by any act of plaintiff. There is no question of estoppel in the case; the defendant in no way changed his position on account of any conduct of the plaintiff. Defendant acted upon his own investigation and knowledge thus obtained. Under such circumstances there can be no estoppel. *Hartung v. Witte,* 59 Wis. 285, 18 N. W. 175; *Heinselman v. Hunsicker,* 103 Wis. 12, 79 N. W. 23; *Fox River F. & P. Co. v. Kelley,* 70 Wis. 287, 35 N. W. 744.

Respecting the third question submitted to the jury, I think the evidence is undisputed that the defendant did aid, abet, counsel, or advise Blakeslee to cut timber west of the true boundary line between the lands of the parties. We need not repeat the undisputed evidence on this point. It is

clearly, in my opinion, an authorization from defendant to cut and remove the timber up to the Patterson line. The position that the Patterson survey marked the true line was asserted and maintained by defendant from the time of the sale to time of trial, and during the trial, and as a defense defendant claimed title by adverse possession to the disputed tract. The defendant sold the timber to Blakeslee, went upon the land with Blakeslee, and put him in possession of the disputed strip for the purpose of cutting and removing the timber. He asserted that in his opinion the Patterson survey was correct. He paid part of the expense of a survey to establish that line as the one forming the west boundary of the disputed strip. He acted upon that boundary and sanctioned the removal of the timber up to it. He continually asserted his ownership at all times up to the rendition of the verdict on trial below in this case.

I see no escape from the conclusion upon the undisputed evidence that the defendant aided, abetted, encouraged, or directed the perpetration of the trespass, and therefore the court below was right in changing the answer of the jury to the third question of the special verdict and ordering judgment for the plaintiff. *McCloskey v. Powell,* 123 Pa. St. 62, 16 Atl. 420; *Northern T. Co. v. Palmer,* 171 Ill. 383, 49 N. E. 553; *Donovan v. Consolidated C. Co.* 88 Ill. App. 589; *Hamilton v. Hunt,* 14 Ill. 472; *McMannus v. Lee,* 43 Mo. 206; *Clark v. Bales,* 15 Ark. 452; *Bruch v. Carter,* 32 N. J. Law, 554; *Judson v. Cook,* 11 Barb. 642; *Shepherd v. McQuilkin,* 2 W. Va. 90; *Deal v. Bogue,* 20 Pa. St. 228. In *Donovan v. Consolidated C. Co.* 88 Ill. App. 589, at page 597 the court said:

"One who in any manner indicates his desire that an act be done may be said to request it, and one who does anything in furtherance of an act may be said to aid or abet it."

There was no error in the portion of the charge excepted to or in awarding costs to plaintiff.

Second. The complaint averred that the plaintiff was the owner in fee simple and in possession of the lands claimed by him, and that the defendant unlawfully entered upon a strip thereof. The defendant denied the plaintiff's title, and further averred that he (the defendant) and his predecessors and grantors "have held the strip of land and premises and been in the actual continued occupancy and possession of the whole thereof . . . for more than twenty years immediately preceding the commencement of this action and of the dates alleged in the complaint; that during the said twenty years the said strip of land . . . has been improved and used for pasture and other farming purposes *by the said defendant.*"

The defendant by his pleadings therefore admitted a trespass on his part and justified that trespass by virtue of his ownership of the strip of land and pleaded adverse possession. Participation in the cutting of timber on this strip by his vendee the defendant denied. But he admitted a trespass and an adverse possession. The plaintiff prevailed on the title to the strip. Therefore on the pleadings alone, with the finding of title in the plaintiff, the latter was entitled to judgment for nominal damages and costs, even if upon the evidence the view of the majority of the court as to the nonliability of the defendant for the cutting and removal of timber by his vendee could be considered sound.

SIEBECKER and TIMLIN, JJ. We concur in the foregoing dissenting opinion.

GODDARD, Respondent, vs. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, Appellant.

April 28—May 24, 1910.

Railroads: Bridges: Obstruction of waters: Negligent construction: Guarding against floods: Injury to property: Instructions to jury.

1. In an action for injury to hay by flood waters alleged to have been obstructed and set back by reason of the negligent construction and maintenance of a railway bridge across a river and adjacent bottom lands, the evidence is *held* to support a verdict in favor of the plaintiff.
2. In such case the jury were properly instructed, in effect, that in building bridges of this kind the surrounding conditions and the liability of the adjacent property to injury must be considered, and that defendant was bound to know and to take into consideration those things which were apparent and to exercise ordinary care in adjusting the construction of its bridge to the situation.
3. A railway company in constructing a bridge should anticipate and provide against floods and freshets which, from having been known to occur at longer or shorter intervals, may reasonably be expected to occur again, but need not make provision against unusual or extraordinary floods such as could not be foreseen by men of ordinary experience and prudence.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Woodward & Lees.*

For the respondent there was a brief by *Morris & Hartwell* and *Winter & Esch,* and oral argument by *Frank Winter.*

TIMLIN, J. The plaintiff sought to recover damages done to a quantity of hay in his barns and also for growing grass destroyed by a flood in the La Crosse river bottom lands on July 21, 1907. He contended that the flood waters were

obstructed, dammed up, and set back upon his hay and grass by reason of the negligent construction and maintenance of a railroad bridge across this river and bottom land by the defendant. The jury by special verdict found that the rainfall which caused the flood was one that ought reasonably to have been anticipated, and that the bridge was not of sufficient capacity to allow the passage of the waters of the flood and of the driftwood and other material brought down thereby; that such want of capacity was the proximate cause of plaintiff's injury, while the amount of his damages was $750. For this sum and costs the plaintiff had judgment.

The defendant, appealing to this court, contends that the flood was extraordinary and unusual, and that there is no sufficient evidence to show that plaintiff's damages were caused by the negligent construction or maintenance of the bridge in question, and that the court erred in its instructions to the jury. We are furnished by the appellant with no map or chart, and for this reason find it difficult to get relative boundaries, courses, or directions with accuracy. Such map and survey are almost indispensable when the appellant claims, as it does here, that by mathematical calculation and proper interpretation of the testimony it appears affirmatively that the plaintiff's damages were not caused by the inadequacy of the bridge in question.

We gather from the oral evidence that the La Crosse river, with the adjacent wide bottom lands, extends from Medary southwest about four miles to its junction with the Mississippi river. This extension is crossed by several bridges between Medary and the Mississippi, the farthest upstream being that of the Chicago, Milwaukee & St. Paul Railway Company running east and west, having a clear opening for the passage of water of 2,768 square feet; next that of the Chicago & Northwestern Railway Company running east and west and having a clear opening for the passage of water of 3,075 square feet; next a wagon road and bridge, called the

Abattoir Road, running easterly and westerly, having a clear opening for such passage of 2,074 square feet; next the road-bed and bridge of defendant running north and south, the bridge constructed upon piles in bunches or bents with twelve-foot spaces between the bents for the passage of water, and the sum of these clear spaces is equal to 6,565 square feet, of which 3,375 square feet is under that part of the bridge which spans the river. Four other railroad bridges cross the river and adjacent bottom lands between the bridge of defendant and the Mississippi river.

The flood took place on or about July 21, 1907, and was caused by a rainfall on that day of 4.48 inches in fourteen and one-half hours at La Crosse and a considerably heavier rainfall at the same time on the upper waters and tributaries of the La Crosse river. Haying was at this time in progress on plaintiff's farm, which is in the bottom lands mentioned and part of which is upstream from defendant's railroad bridge. Plaintiff had nine barns in which his hay was stored, eight of them above this bridge in question. The damages claimed to growing grass practically dropped out of the case before verdict, and it is apparent that the verdict of the jury is based upon the damage done to hay in some of these barns by the flood. Between the defendant's bridge and the Abattoir Road bridge the river banks are higher than the bottom lands lying further from the river, and the surface of the water in the river at ordinary stage is higher than the bottom lands which lie at some distance from the river banks. This, as is well known, is not an unusual condition in deltas and flat alluvial valleys.

We are unable to ascertain with accuracy how far it was from the northwest boundary line of the flood to that point in the defendant's bridge where the bridge spans the river channel. From a point called Grand Crossing south on defendant's line of railroad the track appears to rest on piling for more than 3,000 feet in length, and at 3,000 feet from that

crossing is the railroad bridge in question, 748 feet long, starting from the northerly river bank and crossing the river channel with seven bents of piles in the river and extending south over the south bank and over the adjacent bottoms about 650 feet. This bridge is six or seven feet above the ordinary surface of the water where it crosses the river, and also from three to seven feet over the bottom lands where it crosses the bottoms. Were this and the relative area of openings in the several bridges for the discharge of water all that appeared, it might be difficult to support the verdict. But there was evidence that lumber, planks, hay, brush, and trees were carried down by the flood and lodged against the piling of this bridge. The openings under the upper bridges were large enough to permit this *débris* to pass through. There was also evidence that the piling under defendant's bridge and roadway had been repaired some four years previously, and that in doing so the old piles were not extracted, but were cut off at the ordinary water level, leaving the stumps. There was also evidence of the extent to which the water was dammed up by this condition, and several witnesses testified from observation at the time, and from flood marks observed immediately after the subsidence of the flood, that the water was two feet higher on the east or upstream side of defendant's bridge and track than on the west or downstream side. The figures of levels and measurements furnished by the defendant are not sufficiently explicit to demonstrate that this testimony is impossible. Many necessary data are omitted. A mere smattering of hydraulics is sufficient to inform one that comparative measurements of the openings for the escape of water under the several bridges could not alone determine the question whether defendant's bridge dammed back the water. This relative area of openings is only one of many factors to be considered. Obstructions in the channel or near the channel at or near defendant's bridge, the extent to which the flow of water was obstructed by *débris* of the flood, the depth and direction of the

current, the sinuosities of the channel, the reservoirs formed by expansions of the flood above stream and between the bridges, the angle at which the current approached the congested bents, all affect this condition. It would be presumptuous in us, on the meager data we have before us, to decide that the court below and the jury had no evidence upon which they could find for the plaintiff. *Spelman v. Portage,* 41 Wis. 144.

The instruction criticised related to the second question of the special verdict, which inquired whether the bridges of the defendant were of sufficient capacity to allow the passage of the flood waters with driftwood and other materials, etc. The court instructed the jury that the defendant was bound to know and take into consideration in the erection of its bridges the area of the La Crosse river valley, the bluffy nature of its sides rendering it subject to a rapid rise of the water, and the fact that at times it carried large quantities of brush and *débris* and sometimes stumps and trees, and the amount of rainfall in the past, the occurrence of high water in the past, the location of plaintiff's barns, their liability to be injured, and each and every fact within its knowledge affecting the height of the water and its liability to do damage. In criticising this charge we must keep in mind that the right of the defendant to construct and maintain the bridge in question is not denied. The inquiry is whether it exercised that right carefully, or whether by lack of ordinary care it so exercised that right as to injure others. *Schmeckpepper v. C. & N. W. R. Co.* 116 Wis. 592, 93 N. W. 533. The instruction in this respect amounts to informing the jury that in building bridges of this kind the surrounding conditions and liability of the adjacent property to injury must be considered, and that the defendant is bound to know and take into consideration those things which are apparent and exercise ordinary care in adjusting its construction to the situation.

We see nothing improper in this instruction so construed.

We do not think that ordinary readers or hearers would understand this language to mean more than this, although a separation of parts and literal reading of such separated parts might give it a more extended meaning. If a bridge built on piles twelve feet apart would be to one of ordinary care and prudence apparently insufficient to allow the passage of floods and the escape of brush, driftwood, and *debris* carried by the flood, and injury to others was likely to result from such lack of escape, then ordinary care would require some other form of bridge construction or some other means of preventing the injury. This does not mean that the defendant must ascertain the exact area of the La Crosse river valley, but it must notice these things in plain sight, and that floods do occur, and that floods carry *debris,* and the usual high water in the past, and the liability to injury of adjacent property, all of which is ordinarily and usually taken into consideration in the construction of a bridge.

Instead of submitting to the jury directly the question whether the flood of July 21, 1907, was an unusual or extraordinary flood, the court submitted: "Was the storm of July 21, 1907, and the flood resulting therefrom in the La Crosse river, such as should reasonably have been anticipated to occur?" But in connection with this question the court explained to the jury that they were to consider whether the flood was an unusual or extraordinary flood, explained the terms "unusual" or "extraordinary," instructed that the railroad company constructing an embankment or bridge is not required to make provisions against such unusual or extraordinary floods as cannot be foreseen by men of ordinary experience and ordinary prudence in the locality where such flood occurs, but that the defendant ought reasonably to have anticipated all floods and freshets which occur annually or at longer intervals, and which, from having been known to occur at longer or shorter intervals, may be reasonably expected to occur again. As explained by this instruction the ques-

tion seems reasonably clear, and we find evidence in the record upon which the jury might well have found that, notwithstanding the excessive rainfall in the upper valley of the La Crosse river, the flood on July 21, 1907, was not unprecedented, but that higher floods occurred in 1876, 1884, and 1900.

By the Court.—Judgment affirmed.

CUMMINGS, Administratrix, Respondent, vs. C. W. NOBLE COMPANY, imp., Appellant.

April 28—May 24, 1910.

Negligence: Contractor placing material near railway track: Injury to switchman: Liability: Pleading: Definiteness: Demurrer: Misjoinder: Parties.

1. A private contractor who places material on the right of way of a railway company owes to the railway employees the duty to use ordinary care in so placing such material that it will not be dangerous to them while riding on cars and engines in the manner in which they ordinarily ride in the performance of their duties.
2. A contractor whose breach of such duty caused an injury to a railway employee is not relieved from liability therefor by the fact that the railway company was also negligent by reason of its assent to the contractor's act or its failure to remove the danger.
3. In an action against a contractor for an injury caused by his piling timbers near a railway track, a complaint showing that the timbers were placed in such dangerous position before the accident and that they caused it need not state more definitely when they were so placed.
4. A general demurrer to a complaint by one of two defendants, on the ground that no cause of action is stated against him, does not raise the question of misjoinder of parties or causes of action.

APPEAL from an order of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a demurrer to the complaint. The complaint set forth that J. N. Cummings died on September 12, 1909; that the plaintiff was duly appointed and qualified as administratrix of his estate; that decedent, at the time of receiving the injuries which produced his death, was in the employ of the defendant railway company as a switchman in its yards at the city of La Crosse; that the defendant the *C. W. Noble Company* was constructing a sewer alongside of and near to one of the railway tracks of the defendant railway company in said city; that said *C. W. Noble Company* did carelessly and negligently pile and place large quantities of timbers and planks close to said railway track, the same being placed so closely thereto that they would strike the said railway company's employees while engaged in the performance of their work in passing by the same upon the cars and engines of the railway company; that such timbers and planks were negligently so piled and placed on September 4, 1909, and the defendant railway company did carelessly and negligently permit and allow said timbers and planks to be so placed and to so remain on said day; that the same were piled on the right of way of the said railway company; that on said 4th day of September the decedent, who was in the employ of said railway company, while in the performance of his duties, riding upon an engine by or at the place where said timbers and planks had been carelessly and negligently placed by said *C. W. Noble Company,* and had been by said railway company carelessly and negligently allowed to remain, was thrown from said engine by said timbers and planks, and suffered injuries in consequence of which he died on the 12th day of September, 1909. The railway company interposed an answer to the complaint. The *C. W. Noble Company* interposed a general demurrer thereto on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the trial court.

The cause was submitted for the appellant on the brief of *George H. Gordon,* and for the respondent on that of *A. E. Bleekman, Jr.,* and *Barton & Kay.*

BARNES, J. 1. The appellant contends that the deceased was the servant of the railway company; that such company was obliged to furnish him a safe place in which to work; that he was not the servant of the appellant, and the latter owed him no legal duty; and that therefore no right of recovery exists against it because no actionable negligence is shown.

The doctrine contended for would be a harsh if not an inhuman one for the courts to countenance. That a private contractor may place an obstruction so close to railway switch tracks that a switchman, in riding upon a car or an engine while doing his usual work, is liable to be killed by coming in contact with such obstruction, and then escape liability by asserting that the person killed or injured was not an employee of such contractor, and therefore it was not liable because it owed him no duty, is a startling proposition that finds no support in the decisions of this court, and little, if any, support in the decisions of other courts.

Presumably the *C. W. Noble Company* knew that the switch tracks were used for switching purposes and that switchmen customarily ride on engines and cars in the performance of their duties. In piling its material on the right of way of the railway company adjacent to the switch tracks, it was bound to exercise ordinary care in so placing it that it would not be a menace to the life or limb of railway employees riding on cars and engines in the manner in which they ordinarily ride while in the performance of their duties. If it failed to exercise such care it was guilty of a tort. It owed to the employees of the railway company the duty of ordinary care, under the circumstances disclosed by the complaint, and the complaint shows that such care was not exer-

cised. The decisions on this point in this court are: *Reinke v. Bentley,* 90 Wis. 457, 63 N. W. 1055; *Olson v. Phœnix Mfg. Co.* 103 Wis. 337, 79 N. W. 409; *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 N. W. 563; *Compty v. C. H. Starke D. & D. Co.* 129 Wis. 622, 625; *Hendrickson v. Wis. Cent. R. Co., post,* p. 179, 122 N. W. 758, 126 N. W. 686; *Lippert v. Jos. Schlitz B. Co.* 141 Wis. 453, 124 N. W. 491. The cases in other jurisdictions to the same effect are numerous, but we do not deem it necessary to cite them to a proposition so well established by our own decisions. It is no answer to the assertion of liability to say that there may also be a liability on the part of the railway company because it permitted the obstruction to be placed where it was or failed to remove it after it knew, or in the exercise of ordinary care should have known, of its existence. Such an obstruction might well be put in place under such circumstances that there would be no liability on the part of the railway company. If the appellant was negligent in the first instance, it is not relieved from liability to the person injured because the employer of the decedent was also negligent by reason of its assent to the act or because it failed to remove the danger.

2. It is next urged that the complaint is defective because it does not allege when the timbers were piled near the railway track. It is alleged that, before the accident occurred, they were placed in the dangerous position which they occupied and that they caused the accident. Such allegation is sufficient to show liability.

3. Lastly it is argued that there is no privity between the defendants and therefore no joint liability for the injury exists. This question is not before us. There was no demurrer interposed to the complaint because of a misjoinder of parties or of causes of action; simply a general demurrer on the ground that a cause of action was not stated against the appellant. Subd. 4, sec. 2649, Stats. (1898), specifies a defect of parties as one of the grounds of demurrer, and

subd. 5 of the same section specifies as a separate ground of demurrer that several causes of action have been improperly united. Sec. 2651 requires that the grounds of demurrer to the complaint shall be distinctly specified. Sec. 2653 provides that, when any of the grounds of demurrer enumerated in sec. 2649 do not appear on the face of the complaint, the objection may be taken by answer, and the following section (2654) provides that, if objection is not taken by demurrer or answer, the defendant shall be deemed to have waived the same.

By the Court.—Order affirmed.

HENDRICKSON, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

September 15—October 5, 1909.
April 29—May 24, 1910.

Master and servant: Railroads: Who are servants: Injury to person working on car in service of another: Volunteers: Negligence: Contributory negligence: Evidence: Instructions to jury: Appeal: Harmless errors.

1. Where a person who was assisting the conductor of a railway train to repair a brake on a car, but who had not been employed by the conductor under any express authority or because of any sudden emergency necessitating his employment, was injured by negligence of the engineer, the railway company cannot be held liable on the theory that the injured person was its servant.
2. A foreman employed by a granite company at its quarry, whose duty included attending to the reception and placing on a spur track of the cars which were to be loaded at the quarry, and who, while performing such duty in connection with a switching crew of the railway company, undertook with the conductor's consent to assist in repairing the brake on one of the cars which they were attempting to put in place, was not a

trespasser, intermeddler, or mere volunteer with respect to such work of repair, but was engaged in forwarding the interest and business of his employer in that part of the business in which such employer and the railway company had a common interest; and for an injury sustained by him while so engaged, caused by negligence of the servants of the railway company, the latter is liable.

3. Findings by the jury in such case to the effect that the servants of the railway company were negligent in backing the engine without signal or warning against the empty cars, on one of which the plaintiff was helping to repair the brake, and that plaintiff was not guilty of contributory negligence, are *held* to be sustained by the evidence.

4. It being undisputed that the engine struck the cars, that the conductor had given no signal for its backing, and that he did not expect it to do so while he and plaintiff were attempting to repair the brake, no prejudice resulted to defendant from the admission of testimony that the conductor stated, after the accident, that "he did not think himself that the engine was going to hit the car," even though such statement was not properly admissible as part of the *res gestæ*.

5. A refusal to give a correct requested instruction, as to a question in the special verdict, that unless the jury were satisfied from a preponderance of the evidence that it should be answered "Yes" they should answer it "No," was not prejudicial error, where the jury were instructed that their answers to all the questions should be in accordance with what they believed to be the fair weight of the whole evidence, and, as to the particular question, that if they so affirmatively believed from the whole evidence they should answer the question accordingly, and if they were not so satisfied they should give the opposite answer.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action for damages for personal injuries alleged to be due to the negligence of the servants of the defendant railway company. Plaintiff was the foreman of the quarry crew of the Wisconsin Granite Company at Waupaca. As such foreman he had charge of the loading of railroad cars with the crushed granite from the quarry. The crusher of the granite company is about eighteen feet below the level of

the main line of track of the defendant. The bins containing the crushed granite are over a spur track, are directly connected with the crusher, and are supported by heavy stone walls. The supporting walls are about fifty-five feet long, and with the bins made a tunnel through which the cars to be loaded with the crushed granite may pass, but which is too low to allow a locomotive to pass through. The crusher is located about 900 feet west of the switch connecting the spur track with the main track. The spur track, which is used exclusively for loading the products of the granite company, extends west of the crusher some 300 or 400 feet. For a short distance west of the tunnel, through the tunnel, and for four or five car lengths east of the tunnel the spur track is practically level. East of this level track to the spur track switch is an up grade of eighteen feet. West of the level track there is a slight up grade for a short distance, beyond which the track is nearly level. It was customary for the train crew of the defendant to take loaded cars from the level track in and to the east of the tunnel and to place empty cars upon the slightly elevated track to the west of the crusher. Either a sufficient number of cars to reach from the track on the higher level west of the tunnel to the east of the tunnel were placed between the empty cars and the locomotive, and the empty cars were thus pushed back by the locomotive to the place desired, or the empty cars were dropped down the grade from the elevation on the east of the spur track, and carried by the momentum acquired in the eighteen-foot descent along the level track and up the slight rise onto the track west of the tunnel. When the empty cars had been gotten upon the elevated track west of the tunnel by either process, the trainmen on the cars would set the brakes and anchor the cars upon the elevated ground. A short distance to the west of the crusher building a roadway crossed the spur track. The employees of the granite company were liable to be upon this roadway, or near or

upon the spur track, at all times of the day in the performance of their duties, and there is evidence that when the cars were first brought onto the switch it was customary for an employee of the railway company to ride upon the most westerly of the cars to give warning to persons near or upon the track, to avoid inflicting injuries upon them, and also to set the brakes to anchor the cars in the desired positions.

As foreman of the quarry crew it was the duty of the plaintiff to see that the cars were properly loaded. Preliminary to loading it was necessary to have the cars so placed on the side track that they could be moved or run into the tunnel into such positions as would be convenient for loading, and it was customary for the plaintiff to be at hand when the empty cars were brought upon the spur track and to see that they were so placed that they could be conveniently handled and located for loading them. When a car was wanted for loading, the quarry crew would loosen the brakes and let the car drop down from the elevated track west of the tunnel onto the level track under the bins. When filled the car would be moved onto the level track east of the tunnel.

On June 11, 1906, the loaded cars had been taken from the spur track and four or five empty cars had been dropped down the grade in the spur track. The conductor was upon the most westerly of the cars, and there is some evidence that a brakeman was on the most easterly of the string of empties. After the cars had passed through the tunnel and ascended the grade to the west the conductor attempted to anchor them there by setting the brake on the car. The brake did not operate and the cars started to return along the grade toward the east. There is evidence that the conductor got off on the south side of the car and attempted to block the wheels. There is evidence that when the cars were being brought in on the spur track the plaintiff came toward the spur track from the north, and when he observed that the brake did not work he also tried to block the wheels. Neither attempt was

successful and the cars passed on into the tunnel. The conductor and the plaintiff met and passed some remarks and both went into the tunnel.

Evidence was introduced to the effect that it was customary for the engineer on the switching locomotive to wait for a signal from the man on the most westerly car before he moved the locomotive for the purpose of respotting the cars, when this was necessary. On the occasion in question the conductor gave no signal. While he was upon the car and had his hands upon the brake, and while the plaintiff was in the act of helping to repair the brake, the locomotive was brought into violent collision with the other end of the string of empty cars, and as a result the plaintiff was thrown down and terribly injured and maimed. This is an appeal from a judgment in plaintiff's favor.

Walter D. Corrigan, for the appellant, contended, *inter alia,* that ordinarily trainmen have no authority to employ servants for the company. 3 Elliott, Railroads, § 1305; *Central T. Co. v. T. & St. L. R. Co.* 32 Fed. 448; *Sloan v. Central I. R. Co.* 62 Iowa, 728, 16 N. W. 331; *Ga. Pac. R. Co. v. Propst,* 83 Ala. 518, 3 South. 764; *Fox v. C., St. P. & K. C. R. Co.* 86 Iowa, 368, 53 N. W. 259, 17 L. R. A. 289; *Bradley v. N. Y. C. R. Co.* 62 N. Y. 99; *Vassor v. Railroad,* 142 N. C. 68, 54 S. E. 849; *Cooper v. L. E. & W. R. Co.* 136 Ind. 366, 36 N. E. 272; *Powers v. B. & M. R. Co.* 153 Mass. 188, 26 N. E. 446; *Eaton v. D., L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Croft v. C., R. I. & P. R. Co.* 132 Iowa, 687, 108 N. W. 1053; *Atchison, T. & S. F. R. Co. v. Lindley,* 42 Kan. 714, 22 Pac. 703; *Mickelson v. N. E. T. R. Co.* 23 Utah, 420, 64 Pac. 463; *McDaniel v. H. A. & B. R. Co.* 90 Ala. 64, 8 South. 41; *Wagen v. M. & St. L. R. Co.* 80 Minn. 92, 82 N. W. 1107; *Church v. C., M. & St. P. R. Co.* 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861; *Atlanta & W. P. R. Co. v. West,* 121 Ga. 641, 49 S. E. 711; 3 Cream of Law, § 94; *Taylor v. B. & O. R.*

Co. 108 Va. 817, 62 S. E. 798; *Evarts v. St. P., M. & M. R. Co.* 56 Minn. 141, 57 N. W. 459, 22 L. R. A. 663, 664; *Rummell v. Dilworth, P. & Co.* 111 Pa. St. 343, 2 Atl. 355; *Fox v. Sanford,* 67 Am. Dec. 587, 597, note; *Flower v. Pa. R. Co.* 69 Pa. St. 210, 8 Am. Rep. 251; *New Orleans, J. & G. N. R. Co. v. Harrison,* 48 Miss. 112, 12 Am. Rep. 356. There is an exception to this general rule as to authority, that in case of emergency such authority is implied. This is shown by the authorities before cited. Another exception to the general rule is where the person aiding is at the same time engaged in expediting his own business, or the business of his master which he is employed to perform. *Wright v. L. & N. W. R. Co.* L. R. 1 Q. B. Div. 252; *Holmes v. N. E. R. Co.* L. R. 4 Exch. 254, L. R. 6 Exch. 123; *Street R. Co. v. Bolton,* 43 Ohio St. 224, 54 Am. Rep. 803; *Welch v. M. C. R. Co.* 86 Me. 552, 30 Atl. 116, 25 L. R. A. 658, 10 Am. R. R. & Corp. Rep. 293; *Eason v. S. & E. T. R. Co.* 65 Tex. 577. The rule in the last exception is doubted by reputable authority. Elliott, Railroads, § 1303. Every authority in favor of the exception shows that the act upon which the exception was invoked directly, positively, certainly, and immediately expedited the business of the doer or his master. *Street R. Co. v. Bolton,* 43 Ohio St. 224, 1 N. E. 333; *Eason v. S. & E. T. R. Co.* 65 Tex. 577; *Wright v. L. & N. W. R. Co.* L. R. 1 Q. B. Div. 252; *Welch v. M. C. R. Co.* 86 Me. 552, 30 Atl. 116. In the case of a volunteer the company is only liable for wilful injury. 3 Elliott, Railroads, § 1305; *Evarts v. St. P., M. & R. Co.* 56 Minn. 141, 57 N. W. 459, 22 L. R. A. 663, note, 45 Am. St. Rep. 460; *Vassor v. Railroad,* 142 N. C. 68, 72, 54 S. E. 849, 851; *Powers v. B. & M. R. Co.* 153 Mass. 188, 26 N. E. 446; *Atlanta & W. P. R. Co. v. West,* 121 Ga. 641, 49 S. E. 711; *Church v. C., M. & St. P. R. Co.* 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861; *Everhart v. T. H. & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567.

John C. Hart, attorney, and *B. R. Goggins,* of counsel, for the respondent, argued, among other things, that the defendant was negligent in running its engine upon the spur track into these empty cars without warning; in doing so without proper lookout; in doing so at a dangerous rate of speed; in doing so without warning the plaintiff; in failing to promulgate rules and regulations requiring warning to be given of the movement of cars likely to injure the granite company's employees. *Iltis v. C., M. & St. P. R. Co.* 40 Minn. 273, 41 N. W. 1040; *Bain v. N. P. R. Co.* 120 Wis. 412; *Sparks v. Wis. Cent. R. Co.* 139 Wis. 108, 120 N. W. 858; *Polaski v. Pittsburg C. D. Co.* 134 Wis. 259; *Promer v. M., L. S. & W. R. Co.* 90 Wis. 215; *Pennsylvania Co. v. Backes,* 133 Ill. 255, 24 N. E. 563; *Chicago & N. W. R. Co. v. Goebel,* 119 Ill. 515, 10 N. E. 369; *Maguire v. Fitchburg R. Co.* 146 Mass. 379, 15 N. E. 904; *Toledo, St. L. & K. C. R. Co. v. Hauk,* 8 Ind. App. 367, 35 N. E. 573; *North Chicago R. M. Co. v. Johnson,* 114 Ill. 57, 59. It was within the affirmative duty of plaintiff to be where he was, and the work he was doing at the time of his injury was within the scope of his duty to his master and was expediting his master's business. He was not a mere interloper or mere volunteer. *Street R. Co. v. Bolton,* 43 Ohio St. 224, 1 N. E. 333; *Meyer v. Kenyon-Rosing M. Co.* 95 Minn. 329, 104 N. W. 132; *Wright v. L. & N. W. R. Co.* L. R. 1 Q. B. Div. 252; *Aga v. Harbach,* 127 Iowa, 144, 102 N. W. 833; *Railroad v. Ward,* 98 Tenn. 123, 60 Am. St. Rep. 848; *Holmes v. N. E. R. Co.* L. R. 4 Exch. 254, affirmed L. R. 6 Exch. 123; *Catlett v. Young,* 143 Ill. 74, 32 N. E. 447, 449; *Welch v. M. C. R. Co.* 86 Me. 552, 25 L. R. A. 658; *Ill. Cent. R. Co. v. Hopkins,* 200 Minn. 122, 65 N. E. 656. Plaintiff was requested to assist by the conductor, and was performing services for the defendant, though also directly beneficial to the granite company, and was therefore not an intermeddler or trespasser, and while so employed was entitled to protec-

tion. *Johnson v. Ashland W. Co.* 71 Wis. 553, 556; *Sloan v. C. I. R. Co.* 62 Iowa, 728, 16 N. W. 331; *Meyer v. Kenyon-Rosing M. Co.* 95 Minn. 329, 104 N. W. 132; *Wagner v. Plano Mfg. Co.* 110 Wis. 48; *Aga v. Harbach,* 127 Iowa, 144, 102 N. W. 833; *Church v. C., M. & St. P. R. Co.* 50 Minn. 218, 52 N. W. 647. The fixing of the brake was a necessary act at the time, not only for the benefit of the defendant if it intended properly to anchor the cars, but also for the benefit of the granite company; for an efficient brake on this car was at the time a present necessity to the proper conduct of the business of both parties. The conductor was justified in this emergency in calling the plaintiff to his assistance, and while thus employed the plaintiff was entitled to protection. *Johnson v. Ashland W. Co.* 71 Wis. 553; *Files v. B. & A. R. Co.* 149 Mass. 204, 21 N. E. 311; *Fox v. C., St. P. & K. C. R. Co.* 86 Iowa, 368, 53 N. W. 259; *Ga. Pac. R. Co. v. Propst,* 83 Ala. 518, 3 South. 764; *Taylor v. B. & O. R. Co.* 108 Va. 817, 62 S. E. 798; *Vassor v. Railroad,* 142 N. C. 68, 54 S. E. 849.

The following opinion was filed October 5, 1909:

SIEBECKER, J. The facts disclose no express authority in the conductor to employ plaintiff to assist in the conduct of defendant's business. Nor do the facts and circumstances show a condition which warrants the inference that a sudden emergency had arisen in the doing of defendant's business which necessitated plaintiff's employment to conduct the defendant's business. Since there is no ground shown upon which plaintiff can be held to have been the servant of the defendant at the time of accident, no liability for this injury can exist within the relationship of master and servant.

It was plaintiff's duty, as foreman of the granite company's business, to attend to the reception of empty cars and to see that they were so placed on the side track that they could be handled and managed by the granite company's employees

for loading. He had participated in this service and had rendered such assistance as occasion required to accomplish this object. On the day in question he was so engaged while the railway company's switching crew tried to anchor the empty cars on the westerly part of the granite company's side track, and while so engaged in expediting his master's business he undertook, with the conductor's consent, to repair the car brake and was injured. An efficient brake was as necessary for the conduct of the granite company's business as that of the defendant, and its repair served to further the common interest of both the granite company and the railway company. Under such circumstances plaintiff was not a trespasser or intermeddler as to the defendant's business, but was engaged in that part of his master's business in which it and the railway company had a common interest. His assistance in repairing the brake was therefore not a service for the defendant company, but one through which he was forwarding the interest and the business of his master. Under such circumstances the defendant's liability for the negligence of its servants is recognized in the adjudications.

In the case of *Welch v. Me. Cent. R. Co.* 86 Me. 552, 30 Atl. 116, the court states the rule to be

"that where a mere volunteer—that is, one who has no interest in the work—undertakes to assist the servants of another, he does so at his own risk. In such case the maxim of *respondeat superior* does not apply. But where one has an interest in the work, either as consignee or the servant of a consignee, or in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible. In such case the maxim of *respondeat superior* does apply. The hinge on which the cases turn is the presence or absence of self-interest. In the one case the person injured is a mere intruder or officious intermeddler. In the other he is a person in the regular pursuit of his own business, and entitled to the same protection as any one whose business relations with the master

expose him to injury from the carelessness of the master's servants."

Other cases illustrative of the rule are: *Street R. Co. v. Bolton,* 43 Ohio St. 224, 1 N. E. 333; *Martyn v. M. & I. R. Co.* 95 Minn. 333, 104 N. W. 133; *Eason v. S. & E. T. R. Co.* 65 Tex. 577; *Railroad v. Ward,* 98 Tenn. 123, 38 S. W. 727. See, also, 2 Labatt, Mast. & Serv. § 632. We are of the opinion that the facts and circumstances of this case bring it within the rule of these cases and make the defendant liable for the negligence of its servants which caused the injuries.

This leads to the inquiry whether the evidence warrants the finding that the defendant's servants were negligent. There is evidence tending to show that the side track within and west of the tunnel was not clearly visible to the trainmen east of the tunnel; that the person in charge of the empty cars as they passed over the track to the west kept a lookout for persons to warn them of the danger of the approaching cars; that men and teams were accustomed to be on and near the track during the switching operation; and that the plaintiff was customarily about there in the course of his duties, to see that the empty cars were properly placed and anchored on the side track. It is also in evidence that defendant's servants at the time in question kept no lookout and gave no warning to the plaintiff of the danger impending from the backing of the locomotive and the cars. In view of the situation of the track tunnel and the likelihood of plaintiff and others being near and about the track and cars at the time of switching, it was incumbent on the defendant's servants to keep a proper lookout and to give warning of the impending movement of the cars. From the situation disclosed the jury were warranted in concluding that defendant's servants were negligent as to these duties and failed to give a warning of the impending peril which was incident to the switching and respotting of the cars. This issue was submitted to the jury

by the special verdict under appropriate instructions and they found that the defendant's servants were negligent in this respect. This finding cannot be disturbed for want of evidence to support it, and hence the defendant must be held to have been guilty of the negligence charged.

It is urged that the plaintiff was guilty of contributory negligence in taking the position on the track at the time and place disclosed by the evidence. As we have shown, plaintiff was not a trespasser or an intermeddler. He had last observed the locomotive on the main track remote from the tunnel, and understood that it would not return onto the side track to respot the cars without a signal from the person in charge of the empty cars, which in this case the evidence tended to show was the conductor who invited him to assist in repairing the brake. Under these circumstances it was a question for the jury whether or not he was guilty of negligence contributing to produce his injuries. The court properly submitted this issue to them and their finding must stand.

There are numerous exceptions to rulings of the court on the admission and rejection of evidence over defendant's objection, to refusals to submit additional questions in the special verdict, to refusals to instruct the jury, and to the instructions given by the court. Of the numerous exceptions to the rulings on the admission and rejection of evidence many (too numerous to specify here) are mere irregularities which could not have affected the result to defendant's injury.

It is urged that the ruling permitting a witness to state that the conductor stated, after plaintiff crawled from under the cars, "He did not think himself that the engine was going to hit the car," was erroneous, upon the ground that there was nothing to show how long a time had elapsed since the accident; hence it was not admissible as part of the transaction and could not be received as an admission against the defendant. We discover no prejudicial effect from this statement.

It was undisputed that the locomotive hit the cars, that the conductor had given no signal for its backing, and that he did not expect it to do so while he and plaintiff were attempting to repair the brake. The statement obviously related to uncontroverted facts, and hence its admission in evidence could not prejudice the defendant.

The defendant objected to the form and sufficiency of the special verdict. We deem the verdict as submitted sufficient in form and phraseology, and find that under the pleadings and the evidence it covered all the issuable facts.

The instructions of the court appropriately and correctly informed the jury of the rules of law applicable to the case. We will therefore omit a detailed discussion of the many exceptions presented to rulings refusing to give requested instructions to the jury and exceptions to portions of the instructions given.

It is strenuously urged that the court erred in refusing to instruct: "Unless you are satisfied from the preponderance of the evidence that the second question should be answered 'Yes,' you should answer it 'No.'" The court instructed the jury that their answers to all of the questions should be "in accordance with what you shall believe to be the fair weight of the whole evidence," and then specifically directed them, in submitting each question in the special verdict where the burden of proof rested on the plaintiff, that if they so affirmatively believed from the whole evidence then they should answer the question accordingly, and if they were not so satisfied then they were to give the opposite answer. The phraseology is not that usually adopted to express the rule as to the burden of proof, and it would have been better if the court in framing the rule had employed the phraseology approved in the decisions as stating the rule, but we cannot say but that the language employed correctly informed the jury on whom the burden of proof rested respecting the issues submitted to them. Though the instruction is not strictly ac-

curate in form, we cannot say that it misled the jury or affected the substantial rights of the defendant. *Beery v. C. & N. W. R. Co.* 73 Wis. 197, 40 N. W. 687. Other exceptions on like grounds need not be noticed any further.

After an examination of the record it does not appear that any of the errors complained of affected the substantial rights of the defendant, and hence no prejudicial error appears in the record. Sec. 2829, Stats. (1898); sec. 3072*m*, Stats. (ch. 192, Laws of 1909).

By the Court.—Judgment affirmed.

WINSLOW, C. J., took no part.

A motion by the appellant for a rehearing was granted January 11, 1910, and thereafter it was ordered that the re-argument be limited to the following questions: (1) Does the special verdict in this case sufficiently cover the ground of defendant's liability found in the former opinion of this court? (2) Is there evidence to sustain such ground of liability? (3) Was such ground of liability concluded by the judgment below under sec. 2858*m*, Stats. (Laws of 1907, ch. 346)?

The cause was re-argued on April 29, 1910.

For the appellant there was a brief by *Walter D. Corrigan*, attorney, and *Glicksman, Gold & Corrigan*, of counsel, and oral argument by *Walter D. Corrigan*. They contended that the special verdict does not sufficiently cover the ground of defendant's liability found in the opinion of this court. Such ground of liability is that plaintiff was "expediting his own master's business." If plaintiff was more than a mere volunteer it was because he was expediting the business of the Wisconsin Granite Company, his employer. If such was the fact he was not a mere volunteer, and the duty owed by defendant was to exercise toward him ordinary care. From that relation to one's own company, being engaged in ex-

pediting the business he is employed to do, springs all the reason upon which the rule is founded that one in such a situation is something more than a mere volunteer. The question whether plaintiff was more than a mere volunteer is therefore the one great and important question in the case, but that question was not tried or considered by court or jury on the trial. *Street R. Co. v. Bolton,* 43 Ohio St. 224, 1 N. E. 333, 335; *Wright v. L. & N. W. R. Co.* L. R. 1 Q. B. Div. 252; *Eason v. S. & E. T. R. Co.* 65 Tex. 577; *Welch v. M. C. R. Co.* 86 Me. 552, 30 Atl. 116; 3 Elliott, Railroads (2d ed.) § 1305, p. 753; *Railroad v. Ward,* 98 Tenn. 123, 38 S. W. 727. Liability cannot exist unless there is a finding by the jury, justified in the record, that the plaintiff was not a mere volunteer; but there is no such finding in the verdict, nor can such a finding be implied from any finding in the verdict. There is no evidence to sustain such ground of liability.

John C. Hart and *B. R. Goggins,* for the respondent. The ground upon which recovery is expressly sustained is that plaintiff was expediting his master's business, and that the repair of the brake served to further "the common interest of both the granite company and the railway company," a service "through which he was forwarding the interest and business of his master,"—broadly stated, that plaintiff was "rightfully there" otherwise than as the servant of defendant, and was therefore not a "trespasser or intermeddler." A person may be "rightfully there" when the relationship of master and servant does not exist between him and the defendant: (a) When on invitation, without any idea on either side of creating the relation of master and servant, he is doing some single mechanical act without any benefit to himself but beneficial to defendant. *Pennsylvania Co. v. Gallagher,* 40 Ohio St. 637, 48 Am. Rep. 689; *Railroad v. Ginley,* 100 Tenn. 472, 45 S. W. 348; *Goff v. T., St. L. & K. C. R. Co.* 28 Ill. App. 529; *Johnson v. Ashland W. Co.* 71 Wis.

553. Also where there is found present some one or more of the following conditions: (b) Assistance rendered upon request "in work connected with their employment." (c) A service "mutually beneficial." (d) "Personal interest" of the plaintiff or his master. (e) Assistance by one having an interest in "adjusting or fixing an instrumentality" on invitation by defendant or his servant. *Welch v. M. C. R. Co.* 86 Me. 552, 25 L. R. A. 658; *Street R. Co. v. Bolton,* 43 Ohio St. 224, 1 N. E. 333; *Cleveland, T. & U. R. Co. v. Marsh,* 63 Ohio St. 236, 52 L. R. A. 142; *Kelly v. Tyra,* 103 Minn. 176, 114 N. W. 750; *Meyer v. Kenyon-Rosing M. Co.* 95 Minn. 329, 104 N. W. 132; *Eckert v. G. N. R. Co.* 104 Minn. 435, 116 N. W. 1024; *McConnell v. Pa. R. Co.* 223 Pa. St. 442, 72 Atl. 849; *Eason v. S. & E. T. R. Co.* 65 Tex. 577, 57 Am. Rep. 606; *Railroad v. Ward,* 98 Tenn. 123; *Weatherford, M. W. & N. W. R. Co. v. Duncan,* 88 Tex. 611, 32 S. W. 878; *Texas & N. O. R. Co. v. McDonald* (Tex.) 85 S. W. 493; *Pickwick v. McCauliff,* 193 Mass. 70, 78 N. E. 730; *Hartford v. N. Y., N. H. & H. R. Co.* 184 Mass. 365, 68 N. E. 835, 836; *Mo., K. & T. R. Co. v. Thomas,* 48 Tex. Civ. App. 646, 107 S. W. 868; *C., N. O. & T. P. R. Co. v. Rodes,* 31 Ky. Law Rep. 430, 102 S. W. 321; *Maguire v. Fitchburg R. Co.* 146 Mass. 379, 15 N. E. 904, 908; *Rink v. Lowry,* 38 Ind. App. 132, 77 N. E. 967, 969, 970; *Hudgens v. St. L. & S. F. R. Co.* 139 Mo. App. 44, 119 S. W. 522; *Dooley v. M., K. & T. R. Co.* (Tex. Civ. App.) 110 S. W. 135; *Chicago & A. R. Co. v. Pettit,* 111 Ill. App. 172; *Balt. & O. R. Co. v. Charvat,* 94 Md. 569, 51 Atl. 413; *Toledo, St. L. & W. R. Co. v. Miller* (Ind. App.) 88 N. E. 968; *Balt. & O. S. W. R. Co. v. Trennepohl* (Ind. App.) 87 N. E. 1059; *Louisville & N. R. Co. v. Crow* (Ky.) 118 S. W. 365; *Louisville & N. R. Co. v. Hurst* (Ky.) 116 S. W. 291; *Smalley v. R. G. W. R. Co.* 34 Utah, 423, 98 Pac. 311; *Shall v. D. & M. R. Co.* 152 Mich. 463, 116 N. W. 432; *Tinkle v. St. L. & S. F. R. Co.* 212 Mo. 445, 110 S. W. 1086;

Louisville & N. R. Co. v. Farris, 30 Ky. Law Rep. 1193, 100 S. W. 870; *Louisville & N. R. Co. v. Smith,* 27 Ky. Law Rep. 257, 84 S. W. 755; *Central of Ga. R. Co. v. Duffey,* 116 Ga. 346, 42 S. E. 510; *Watson v. W., St. L. & P. R. Co.* 66 Iowa, 164, 23 N. W. 380; *Lowenstein v. Mo. Pac. R. Co.* 134 Mo. App. 24, 119 S. W. 430; *Eaton v. N. Y. C. & H. R. R. Co.* 195 N. Y. 267, 88 N. E. 378; *Barry v. H. & St. J. R. Co.* 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610; *Chicago, I. & L. R. Co. v. Pritchard,* 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. N. S. 857, 865; *Klugherz v. C., M. & St. P. R. Co.* 90 Minn. 17, 95 N. W. 586, 101 Am. St. Rep. 384; *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 218, 219, 115 N. W. 865; *Ill. Cent. R. Co. v. Hopkins,* 200 Ill. 122, 65 N. E. 656; *Elgin, J. & E. R. Co. v. Thomas,* 215 Ill. 158, 74 N. E. 109; *Hudson v. Railroad,* 142 N. C. 198, 55 S. E. 103; *Bain v. N. P. R. Co.* 120 Wis. 412, 98 N. W. 241; *Promer v. M., L. S. & W. R. Co.* 90 Wis. 215, 63 N. W. 90, 48 Am. St. Rep. 905; *Ft. W. & R. G. R. Co. v. Eddleman* (Tex. Civ. App.) 114 S. W. 425; *Iltis v. C., M. & St. P. R. Co.* 40 Minn. 273, 41 N. W. 1040.

The following opinion was filed May 24, 1910:

SIEBECKER, J. The propositions urged by the appellant on this rehearing are that by the decision of this court its liability to plaintiff is placed upon the relation existing between it and the plaintiff as an employee of the granite company, while he was engaged in a service which furthered the common interest of the defendant and his employer; that the issues as to this liability were not litigated or determined at the trial before the lower court; and, if judgment can be awarded on the existing state of the record, it should be in appellant's favor.

There is no controversy but that the rule of liability which was applied to the case in the decision of this court is well established by the adjudications. The contention is that the

question of defendant's liability under this rule of law was not litigated at the trial, and that, upon the facts found by the jury and the undisputed evidence in the record, no case was established which entitled plaintiff to recover as this court decided. These subjects have been ably argued by counsel for the respective parties, and their collection of the adjudications in elucidation of them will be preserved in the published report of the case for future aid and reference.

The decision of the case rested on the ground that plaintiff at the time of injury was performing a service within the scope of his employment and duties and that it furthered the common interest of his master and the railroad company. It is earnestly argued that this conclusion is erroneous, because there is no finding by the jury that plaintiff was performing an act which furthered the common interest of the defendant and the granite company, and that the undisputed evidence will not permit of such an inference. It is claimed that the evidence tends to show that plaintiff's duties in no way required him to be near the cars which were being switched, or to assist in spotting and anchoring them on the granite company's switch track. The facts relied on for this contention were brought to our attention at the former argument, and re-examination of them convinces us that our conclusions respecting plaintiff's duty to attend to the reception of empty cars and see that they were properly placed and anchored on the switch track preparatory to loading by the granite company's employees are correct, and that plaintiff was rightfully at and about the place and track when this switching was being done. It is manifest that the cars were to be so anchored and placed at the time they were switched onto the side track as to facilitate the business of the granite company, and that the plaintiff was delegated to see that this purpose and object was accomplished. In the course of the performance of this duty he would go near the track so as to be on the ground at the time of switching, and would partici-

pate in the operation of anchoring the cars by directing and placing the cars on the track where they could be most conveniently and expeditiously prepared and handled for loading. On the occasion in question it appears that he attempted to block the rear car at the proper place of anchorage, when he discovered that it had started to run toward the tunnel. These facts, and the accompanying circumstances of the conduct of this business by the defendant and the granite company, make it clear that plaintiff was performing duties in the line and scope of his employment as a servant of the granite company, and that he and the railroad company's employees were mutually engaged in anchoring the empty cars on the side track. In view of these facts and circumstances and the situation in which the plaintiff was placed while so engaged with defendant's servants in accomplishing this purpose, we discover no room to question but that the service so rendered by them was mutually beneficial, both to the railway company and to the granite company.

It is vigorously contended that the plaintiff's participation in the work of repair of the brake shows as a matter of law that what he did was wholly outside of his master's business, and that he at the time stepped out of his employment, and that he was a trespasser, intermeddler, or mere volunteer in going onto the track in the rear of the car to participate in adjusting the brake. The argument is that the repair of this brake was an act peculiarly within the exclusive duty of the defendant's employees and wholly foreign to plaintiff's duties; that it was wholly unnecessary to make such repair to enable the defendant to spot and anchor the car; and that neither the granite company's nor the defendant's business required this service to be done at this time and place. We perceive nothing in the nature of this repair to support the claim that it was peculiarly within the duties of the servants of the railway company. It was a simple defect, of an ordinary nature, which any person engaged in anchoring these

cars might readily undertake to remedy. The claim that it was wholly outside of the scope of plaintiff's employment, in view of his relation to the business that was being conducted by the railway company for the granite company, is, in our opinion, not well sustained.

We have adverted to plaintiff's duties in acting for the granite company in the conduct of this particular business. It is evident from the facts shown that an efficient brake was an important essential for spotting and anchoring the cars by the railroad company. It also appears that it was an important and serviceable device for handling the cars so as to have them spotted and anchored where the granite company wished to have them placed for loading and putting its product in transit for the market. These various uses of the brake made it mutually and beneficially serviceable to both companies for their immediate and future purposes. In the light of this situation, its immediate repair was most natural and appropriate, and the fact that the railroad company could thereafter have repaired it does not militate against plaintiff for participating in making the repair, or tend to show that he was a meddlesome participant in this attempt to provide an efficient brake. The conduct of the defendant's conductor and plaintiff in dealing with the situation thus presented to them in the course of their employment accords with a reasonable compliance with their duties, and tended to further the immediate purposes of the objects of the service they were charged to perform, and establishes the fact that the plaintiff was rightfully there to help fix the brake.

The evidence respecting the service that was being performed and the consequent relation it bore to plaintiff is not in dispute, except as to whether or not he stepped upon the track at the request of Conductor Dixon and undertook to assist in the repair of the brake at the place of accident. This specific issue of fact is covered by the fourth question in the special verdict and is answered in the affirmative. It there-

fore follows that the record as to these facts is complete and sufficient and no further trial of them is necessary.

The controversies between the parties respecting the defendant's negligence, its proximate causation of the accident, and plaintiff's contributory negligence are not open to inquiry on this rehearing. The record, therefore, presents a determination of all the issues raised by the pleadings and the evidence essential to plaintiff's cause of action. From the facts established it is considered that the plaintiff was rightfully at the place of accident and engaged in a service in which his master and the railway company had a common beneficial interest, and hence that he is entitled to recover his damages, and the judgment must stand.

By the Court.—Judgment affirmed.

WEISE, Respondent, vs. CITY OF GREEN BAY, Appellant.

April 29—May 24, 1910.

Municipal corporations: Special assessments for paving: Limitation of amount: Classification of pavements: Constitutional law: Due process of law: Statutes: Construction: Repeal.

1. Sec. 959—35, Stats. (1898), as amended by ch. 329, Laws of 1909, limiting the amount to be assessed against the abutting property owner for the cost of street paving constructed on a concrete foundation, is not unconstitutional as an attempted unlawful delegation to cities of the power to exempt property from taxation. The classification of permanent pavements on a concrete foundation is a valid classification, and the class may properly be made the subject of special and peculiar legislation, notwithstanding that in some isolated and infrequent cases inequality may result.
2. The provision of the statute requiring that a lotowner who exercises the option to have the assessment against his property spread over a term of years must agree that he will make no objection to any want of power or irregularity in the making of the assessment, and making the bonds issued in pursuance

of the option conclusive evidence of the validity of the proceedings, is not open to any constitutional objection as being unreasonable and in effect a taking of property without due process of law. The option is a privilege which the legislature could extend or not as it chose, and which, if extended, could be made subject to such conditions as legislative discretion approved.

3. The operation of said sec. 959—35 is not confined to those cities which have special provisions in their charters exempting property which has once been assessed for construction of a pavement, from any subsequent assessments, but is general in its character and extends to all cities to which the act as a whole applies.

4. Ch. 539, Laws of 1909, passed eight days after the act amending said sec. 959—35 (ch. 329, Laws of 1909), though containing some general expressions which, in the absence of other statutes *in pari materia*, would indicate an intent that assessments for paving might be made to any amount against adjoining property, must, in view of the closeness in point of time of the two enactments, and the provision of sec. 2 of said ch. 539 that it should not be construed as repealing any provisions of the statutes, be construed as subject to the limitation of said sec. 959—35 as amended.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

T. P. Silverwood, attorney, and *Jerome R. North,* of counsel, for the appellant, cited, among other authorities, Charter of Green Bay, Laws of 1882, ch. 169, subch. VI, sec. 1; secs. 925—175, 925—182, Stats. (1898); ch. 310, Laws of 1893; ch. 539, Laws of 1909; *Boyd v. Milwaukee,* 92 Wis. 456; *Yates v. Milwaukee,* 92 Wis. 352, 357; *Black v. State,* 113 Wis. 205, 221; *Kingsley v. Merrill,* 122 Wis. 185, 196; *Ramish v. Hartwell,* 126 Cal. 443, 58 Pac. 920; *Hayes v. Douglas Co.* 92 Wis. 429, 444, 446; *Barber A. P. Co. v. Ridge,* 169 Mo. 376, 68 S. W. 1043.

For the respondent there was a brief by *Kittell & Burke,* and oral argument by *John A. Kittell.*

WINSLOW, C. J. This is an agreed case submitted under sec. 2788, Stats. (1898). The facts are that the city of

Green Bay, which is a city incorporated under a special charter, but which has adopted that part of the general city charter law relating to city improvements (subch. XVIII, ch. 40*a*, Stats. 1898), constructed a permanent pavement with a concrete foundation on Adams street and charged the whole expense of that part of the pavement from the curb to the center of the street in front of two lots owned by the plaintiff against the lots, amounting to the sum of $396, or $1.92 per square yard of pavement. In 1892 the city had laid a cedar block pavement on the same street and charged $1.10 per square yard therefor against the plaintiff's property, which was paid, and the plaintiff claims that under the provisions of sec. 959—35, Stats. (1898), as amended by ch. 329, Laws of 1909, only the difference between $1.10 and $2 per square yard can now be charged against his property. The circuit court so decided and the city appeals.

The difficulties in the case arise out of the construction of somewhat inharmonious statutes relating to street improvements in cities. The first of these statutes is ch. 310 of the Laws of 1893, afterwards incorporated in the Statutes of 1898 as secs. 959—30 to 959—35, inclusive. This law was evidently passed for a very definite purpose. Pavements consisting of asphalt, brick, and other lasting materials resting on concrete foundations were at that time being introduced in the West, and the somewhat ephemeral wooden pavement was passing out of use. These new pavements were evidently regarded as forming a class by themselves, because they were, relatively speaking, permanent constructions, and would not require to be frequently renewed or rebuilt. They also were considerably more expensive, and hence their adoption would impose a much greater burden on the adjacent lot-owner. These differences were doubtless deemed to justify the classification of these pavements, and the passage of a law relating to them alone and providing that, when such pavements should be laid in cities exceeding 20,000 in population,

the council might grant to lotowners the option to pay their assessments in instalments running from five to ten years, instead of being obliged to pay the entire sum at once. The elaborate and full provisions of the law relating not only to the exercise of the option, but to the issuance of so-called improvement bonds against the lots, the effect of the bonds, and the manner of their collection leave no doubt on the mind that the legislative purpose in this act was to provide a complete and uniform code under which all of the cities of the state having the required population might lay these permanent and expensive pavements under a plan which would not operate to confiscate any adjoining property by an enormous assessment payable at once, but would permit of gradual payments distributed through a term of years. While the law was under legislative consideration it was evidently remembered that there were some cities in the state (like Milwaukee and La Crosse) whose special charters provided that, where adjoining property had once been assessed for the construction of a street pavement and the assessment had been paid, such property should not be again assessed for paving purposes. In order to meet this difficulty, sec. 6 of the original act (sec. 959—35, Stats. 1898) was incorporated therein, providing that no adjacent property should be exempt from assessment for such permanent pavement until such property should have paid in the aggregate for street pavements in front thereof the sum of $3 per square yard of roadway between the curb and the center of the roadway, and further providing that "where any property has paid less than said amount it shall be liable for any difference up to the amount of three dollars." By ch. 329 of the Laws of 1909 this last-named section was amended by reducing the limit of the aggregate amount which may be assessed against adjacent lots from $3 per square yard to $2.50 in cities of the first class and $2 in cities of the second or third class. The original law was vigorously attacked as unconstitutional soon after

its passage, but was declared constitutional by this court in *Boyd v. Milwaukee,* 92 Wis. 457, 66 N. W. 603. Since that decision was made the law has not been seriously attacked, and has unquestionably been acted under many times by many of the cities of the state. The particular section in controversy here, namely, the section placing a limit upon the aggregate amount to be charged against adjacent lots, was not attacked in that case, nor was it necessary to determine whether the aggregate so fixed was intended to include the sums paid for other pavements in the past or only the sums which might be paid for permanent pavements with a concrete foundation. This latter question was, however, involved in *Loewenbach v. Milwaukee,* 139 Wis. 49, 119 N. W. 888, where the validity of the whole act was again affirmed, and it was held that the $3 limit applied to both original and subsequent pavements. We have no disposition to review at length these questions again.

It is true that some new arguments on the question of constitutionality are now presented. It is said that the section in question is nothing more than an attempted unlawful delegation to the city of the power to exempt property from taxation, because the city may build upon one street a permanent pavement with a concrete foundation, and upon another street a similar pavement with a stone foundation, and assess the entire cost against adjacent lots on one street and only ninety cents upon the other, although the lots on both streets have been assessed $1.10 per square yard for wooden block pavements previously laid. Doubtless this result might follow under the conditions supposed, but it would not necessitate the condemnation of the law as unconstitutional. If the classification of the permanent pavement on a concrete foundation was a valid classification when made, as we think it was, then the class might properly be made the subject of special and peculiar legislation, and the law must be held valid notwithstanding that in some isolated and infrequent

cases inequality may result. Human foresight has not yet been able to devise legislation which always and under all circumstances operates with perfect justice.

Again, it is urged that because the statute requires that a lotowner who exercises the option to have the assessments against his property spread over a term of years must agree that he will make no objection to any want of power or irregularity in the making of the assessment, and because the bond issued in pursuance of the option becomes conclusive evidence of the validity of the proceedings, the law is unreasonable and in effect takes property without due process of law. In this connection *Hayes v. Douglas Co.* 92 Wis. 429, 65 N. W. 482, where a provision that the right of the property owner to contest such proceedings should be cut off at the end of thirty days after the assessment was made was held to be not due process of law, is relied on. The case is not applicable because under the law in question in that case the property owner had no choice. There was but one course of procedure authorized by the statute, and under this course the short limitation always applied. In the present case, however, the agreement to waive defenses is not required unless the property owner chooses to exercise the option offered him by which he can elect to have the assessments spread over a number of years. This option is a privilege given to him which the legislature could extend or not, as they chose, and which, if extended, could, of course, be made subject to such conditions as legislative discretion approved. The property owner does not have to accept it, but, if he does, he accepts it with its limitations.

As to the contention that sec. 959—35 was only intended to apply to that class of cities which have special provisions in their charters exempting property which has once been assessed for construction of a pavement from any subsequent assessments, to which class *Green Bay* does not belong, we are quite well satisfied that it ought not to prevail. The

language of the section is not happy. It apparently assumes that there is an existing exemption which is to be controlled and curtailed thereby, but we cannot doubt that it was intended to apply to all cities to which the act applies. Any other construction would result in producing diversity by means of a law which was unquestionably intended to secure uniformity, and we therefore hold that the limit beyond which assessments cannot go was intended to apply to all cities covered by the law.

Eight days after the passage of ch. 329 of the Laws of 1909, amending sec. 959—35, Stats. (1898), by changing the limit of aggregate assessments, another law was approved relating to the construction of pavements in all cities of the state, except cities of the first class, known as ch. 539 of the Laws of 1909, and the appellant claims that this act operated to repeal the limitation section under consideration. This law adds ten new sections to the statute numbered from 959—30*a* to 959—30*j*. Careful study of the law demonstrates that its predominant purpose was to make it possible for cities to advertise for bids for different kinds of pavements in competition with each other, and thus remedy the difficulty which was held fatal to an assessment made under the charter of the city of Superior. *Stocking v. Warren Bros. Co.* 134 Wis. 235, 114 N. W. 789. In that case this court held that under the Superior charter, which is practically the same in its provisions as the general charter law, competition between two or more different kinds of pavements was not contemplated or permitted.

It is true that this law contains general expressions which, in the absence of other statutes *in pari materia,* would indicate an intent that assessments for paving might be made to any amount against adjoining property, but when we consider the fact that only eight days previously the legislature had acted on the question of limitation of the aggregate amount of such assessments, and that they also declared in

sec. 2 of the act now under consideration that "this act shall not be construed as repealing any provisions of the statutes, but shall constitute and prescribe a mode of making city improvements which any city may follow in any instance if the common council of such city shall so elect," we cannot doubt that they intended to leave the limitation in force, and that the provisions of the last-named act must be construed as subject to the existing limitation.

By the Court.—Judgment affirmed.

ROBINSON, Plaintiff in error, vs. THE STATE, Defendant in error.

April 29—May 24, 1910.

Criminal law: Competency of witnesses: Children: Discretion: Rape: Sufficiency of evidence: Unsworn testimony: Waiver of objection: Mental capacity: Opinions of nonexperts: Time of offense: Instructions to jury: Evidence as to character: Refutation: Proof of other immoral acts: Rebuttal.

1. Unless it appears to have been an abuse of discretion, the ruling of the trial court that a child of limited mentality and intelligence was competent to testify will not be held error.
2. A conviction of rape is *held* to be sustained by the direct and positive testimony of the prosecutrix, a child between thirteen and fourteen years old of limited intelligence, together with some corroboration, the question of her credibility being one for the jury.
3. Where a defendant expressly consents, even under pressure from the court, to the admission of unsworn testimony of young children, he waives any right to complain thereof.
4. A nonexpert witness cannot give a general opinion as to the mental capacity of a person, but may testify as to specific interviews and the impression left upon his mind as to the person's mental peculiarities exhibited in such interviews.
5. Where, on a trial for rape, the prosecutrix testified to only one offense and the testimony of the accused evinced no uncer-

tainty as to the occasion referred to, so that the jury in finding him guilty must have agreed upon the commission of one specific offense, there was no error in an instruction permitting conviction for an offense committed at any time within the period of limitation prior to the time charged in the information.

6. The privilege of general vilification of a witness by proof of disreputable conduct not connected with the facts on trial should be allowed only in the exercise of judicial discretion, and then only to affect the credibility of the witness, and not to be considered upon the question of guilt or innocence if the witness is also the accused person on trial.

7. Refutation of evidence of the general good character of an accused must be by proof of general reputation or character and not of specific acts.

8. Where, on a trial for rape, the accused himself testified and also offered other evidence to show the innocent and meritorious character of his relations and usual acts with girls other than the prosecutrix who frequented his place of business, it was permissible for the state to show that the conditions which he sought to prove as suggestive of his innocence did not exist, and to show that the presence of such girls on his premises, invited by him, was often immoral and libidinous instead of uniformly innocent and conventional as he had sought to prove.

ERROR to review a judgment of the municipal court of Dane county: ANTHONY DONOVAN, Judge. *Affirmed.*

Writ of error to review conviction for carnal intercourse with a female under fourteen. The prosecutrix was between thirteen and fourteen, of quite limited mentality and intelligence, and in whom the absence of chastity appeared by physical examination and by her own testimony. She asserted that the defendant, a man sixty-two years of age, keeping a petty shop for sale of candies, notions, and pictures, and an employment agency, enticed her therein, and, by promise of a trifling sum of money, induced her to consent to the carnal act. Hers was the only direct testimony thereto; but physical examination very shortly thereafter, testimony of a witness to her presence at the shop and retirement with defendant into a back room, and perhaps some other facts, are

claimed as corroborative. Defendant introduced evidence of good character of himself and his place of business and appeared as a witness and testified to the respectable character of the business. On cross-examination he denied various specific indecent and improper acts with other girls of various ages and at different times coming to his store. The state upon rebuttal was allowed to introduce affirmative proof of these several acts.

For the plaintiff in error there was a brief by *Ollis & Nelson,* and oral argument by *R. N. Nelson.*

For the defendant in error there was a brief by the *Attorney General* and *Vroman Mason,* district attorney, and oral argument by *Mr. Mason.*

DODGE, J. We have concluded, after doubt on some, that none of the assignments of error necessitate reversal, for reasons to be stated:

1. The competency of the accusing witness was fairly within the trial court's discretion, guided by his experience with her upon the preliminary examination, as also by her appearance. There is not enough in the record to convince us that such discretion was abused.

2. Her testimony being admissible, the verdict was not without support from evidence. That testimony is direct and positive to commission of the act charged, and apparently with understanding of that to which she testified. The question of her credibility, which doubtless is a serious one, was nevertheless for the jury, and she was not wholly without corroboration.

3. The admission of unsworn testimony, even from very young children, could hardly be justified but that defendant, albeit under considerable pressure from the court, yielded his express consent to omission of the oath, and has thereby waived all complaint thereof. *Oborn v. State, post,* p. 249, 126 N. W. 737.

4. There was no error in excluding the opinion of Mr. Smith, not an expert witness, as to prosecutrix's mental capacity to testify. The question called for a general opinion at a time when he had merely stated generally the extent of his acquaintance with her and opportunities for observation. The court later allowed him to testify as to specific interviews and the impression left upon his mind as to her mental peculiarities exhibited in such interviews. Such is the true field of opinion from the nonexpert. *Duthey v. State,* 131 Wis. 178, 186, 111 N. W. 222.

5. The permission to convict for an offense at any time within the limitation period prior to June 30, 1909, given by an instruction, while technically correct in some cases, might be prejudicially erroneous in others, unless very carefully guarded and qualified. In the instant case we can discover no prejudice. While prosecutrix was very contradictory as to the date, still she testified to only one offense at any time committed upon her by defendant, and his testimony evinces no uncertainty as to the occasion referred to. There was therefore no opportunity for part of the jury only to believe in the commission of one offense and part of them to rest their verdict upon another. If they agreed on the commission of one specific offense, it was immaterial whether it was committed in March or June. Defendant could not have been embarrassed in his defense by uncertainty as to the occasion involved.

6. The remaining and most serious question presented by several assignments of error arises upon allowing the state in rebuttal, over objection, to offer evidence of various specific immoral and libidinous acts by defendant in his store, addressed to girls and young women resorting thereto apparently in the course of business, such as the exhibition, from amongst his stock, of indecent pictures, the taking of personal liberties, and even solicitation to carnal intercourse. The evidence, if inadmissible, was beyond doubt highly preju-

dicial. Was it properly admissible? Counsel suggests that it might have been admitted as having bearing on defendant's credibility, he having made himself a witness. The privilege of general vilification of a witness by proof of disreputable conduct not connected with the facts on trial is one so liable to abuse that it should be closely guarded and allowed only upon the exercise of judicial discretion of the trial court, and then only to affect the credibility of the witness, and not to be considered upon guilt or innocence if the witness is also the accused person on trial. *Dungan v. State,* 135 Wis. 151, 115 N. W. 350. But that discretion was not exercised upon this trial. The court not only did not limit the effect of the evidence to the credibility of defendant, but expressly admitted it as relevant to the merits of the case. Another suggested justification is that such specific immoral acts went in refutation of the evidence which defendant had offered of his general good character. The rule is, however, universally established that such refutation must consist of proof of general reputation or character and that specific acts are not admissible. *Comm. v. O'Brien,* 119 Mass. 342; Torrance in 12 Yale Law Jour. 359. However, another ground of relevancy and admissibility was urged on the trial, namely, to refute defendant's testimony. He had very industriously sought, apparently in anticipation of an argument that frequent presence of girls on his premises was suspicious, to prove that he conducted a legitimate business in the sale of candies, picture cards, ornaments, and the like, which attracted their presence; also that he conducted an employment agency. He testified and offered other proof to show that such acts of familiarity with little girls, treating to candy and showing of pictures, as were afterwards proved, were mere acts of kindness or a method of selling his wares, and that access to his back room by prosecutrix and others was frequent for use of his telephone and was innocent. Now, whether or not such acts might have been shown by the state originally or even com-

mented on in argument, a defendant might perhaps show the innocent and meritorious character of his relations and usual acts with a class of persons of whom prosecutrix was one. When he did so, however, he raised a new issue, and we think it was at least permissible for the state to show that the conditions which defendant had sought to prove as suggestive of innocence did not exist, and to show that the presence of such girls on his premises, invited by him, was often immoral and libidinous, instead of uniformly innocent and conventional, as he had sought to prove. We base this conclusion upon the peculiar attitude of the defendant as exhibited by the record in this case, as inviting and indeed necessitating this type of evidence in ascertaining the truth of facts asserted by defendant as a most persuasive defense. A situation very similar in principle was held to justify otherwise incompetent facts in *Schissler v. State,* 122 Wis. 365, 373, 99 N. W. 593; *Grabowski v. State,* 126 Wis. 447, 454, 105 N. W. 805.

By the Court.—Judgment affirmed.

KUROWSKI, Plaintiff in error, vs. THE STATE, Defendant in error.

April 29—May 24, 1910.

Witnesses: Limiting cross-examination: Discretion: Forgery: Evidence.

1. The trial court has a broad discretion as to the extent to which details of conversation may be elicited on cross-examination. Limiting the cross-examination in that respect was not an abuse of discretion in this case, the essential parts of the conversations in question being before the court and jury, and the attitude of the witness being sufficiently disclosed to enable them to judge of the weight of her testimony.
2. In a prosecution for forging a deed conveying land of another to defendant's wife, evidence that a bank to which, after the forgery, the wife mortgaged the land had voluntarily given a quitclaim deed to the owner without consideration, was admissible.

ERROR to review a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The plaintiff in error, hereinafter called the defendant, was convicted of having forged a deed of premises owned by Pauline Janueska, who is the complaining witness. He was sentenced to imprisonment for four years.

For the plaintiff in error there was a brief by *C. F. Dillett* and *P. J. Winter,* and oral argument by *Mr. Dillett.*

For the defendant in error the cause was submitted on the brief of the *Attorney General* and *Albert S. Larson,* district attorney.

SIEBECKER, J. The complaining witness, on cross-examination, testified to interviews between herself and defendant after she had been informed that the defendant was charged with having forged this deed. She admitted that they had discussed the subject of settling the matter upon a basis of reimbursing her for expenses incurred on account thereof. She also stated that the defendant proposed to pay her $500; that she might accept it if she were permitted to do so under the law; and that the defendant spoke of this arrangement with her at various times before and after his arrest. She denied being the active party in the matter, and claimed that the defendant made the proposal and persisted in the offer. On her cross-examination the court excluded inquiry into the particulars of these various interviews with the defendant. The defendant was permitted to testify to details of them, and stated, in effect, that the complaining witness proposed such settlement, persistently besought him for the $500, and offered in consideration thereof to drop the criminal prosecution. It is urged that the cross-examination was unduly restricted respecting the particulars of these alleged interviews. The complaining witness had given her version thereof. She denied having taken an active part in the matter, and claimed that the defendant proposed and persisted in making the settlement. It is evident that the court and

jury were in possession of the essential parts of these interviews, and that the complaining witness's attitude was sufficiently disclosed to enable the court and jury to judge of the weight of her evidence. A trial court's judgment of the extent to which details of conversation may be elicited on cross-examination is not to be confined to strict and narrow boundaries. Within this rule, we find no prejudice in limiting cross-examination of this witness so as to exclude some of the particulars of these interviews.

It is further urged that the evidence showing that a bank which, after the alleged forgery by the defendant, had obtained a mortgage from defendant's wife on the premises involved, and had voluntarily given a quitclaim deed to the complaining witness without consideration, was improperly received. The argument is that the jury probably inferred from this evidence that the defendant forged the deed. The effect of this deed was to remove the cloud upon the title which defendant admitted he had wrongfully brought about. It was relevant to the question of defendant's conduct in dealing with the premises, and hence cannot be held to have been erroneously admitted in evidence.

It is contended that prejudicial error was committed in the admission of evidence as to defendant's general reputation for truth and veracity. It is claimed that the questions propounded to witnesses on this subject were not appropriately framed to elicit information as to his general reputation in this regard. The record shows that the several questions pertaining to this inquiry, when considered together, properly covered the subject of defendant's general reputation under investigation.

The remarks of the prosecuting attorney made before the jury in summing up the case, which are claimed to have been prejudicial to the defendant's rights, pertained to a transaction which had been the subject of comment during the trial. The court held that they were responsive to contentions of de-

fendant's counsel respecting defendant's knowledge of his right to mortgage the premises under his claim of holding the title under a voluntary conveyance from the complaining witness. The remarks were evidently directed to meet this claim of defendant, and they were not otherwise of an objectionable nature.

We discover no prejudicial error in the record.

By the Court.—Judgment affirmed.

CASES DETERMINED

AT THE

August Term, 1910.

KOHL, Appellant, vs. KOHL, Respondent.

March 16—October 4, 1910.

Divorce: Cruel and inhuman treatment: Division of property: Disregarding stipulation.

1. Ill treatment of one spouse by the other which, though not operating directly on the body, is of a nature well calculated to inflict pain and suffering in body and mind and thus to produce injurious results which make cohabitation dangerous to the former's health and life and to render it wholly impracticable for him to properly discharge his marital obligations, is cruel and inhuman treatment in the law and constitutes ground for divorce.
2. Upon the granting of a divorce to the husband on the ground of cruel treatment by the wife, a division of his property by which the wife was awarded $1,200 in money, the household goods, and $3 per week to be paid to her by the husband for support of the children during minority, one of them being five years old and the other seventeen and able to sustain herself, and the husband was to retain the homestead and other property, of the probable market value of about $2,500 in all, out of which he must pay the costs and expenses of the litigation, is affirmed on an appeal by the wife.
3. A stipulation in such case by which the husband, not knowing that the wife had possession of $1,200 of his money, had agreed to give her the homestead and pay her $3 per week for the support of the children, was properly disregarded by the trial court upon refusal of the wife to pay over $1,200 to the husband.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Plaintiff brought an action for divorce from the defendant, alleging cruel and inhuman treatment toward her; nonsupport, although the defendant was amply able to support her and their minor children; defendant's uncontrollable temper, which made it dangerous for her to live with him; and that she had faithfully discharged her duties as wife and had observed her marriage vows during the whole of their married life. The defendant answered denying the allegations of the complaint charging grounds for a divorce, and alleging a counterclaim for divorce on the ground of cruel and inhuman treatment. The action was tried in the county court of Fond du Lac county, and at the conclusion of the trial the court granted a new trial. Upon an affidavit of prejudice filed by the defendant the action was removed to the circuit court for Fond du Lac county. Before the trial of the action the parties entered into a stipulation whereby, in the event of the defendant being found to be entitled to a divorce and of a final division of the defendant's property being decreed, then the plaintiff was to have the homestead of the parties absolutely and the care and custody of the minor children. By this stipulation the defendant also agrees "to pay $3 per week as and for alimony for said minor children until Eunice reaches twenty-one years of age and Fayette reaches the age of twenty-one."

No evidence was introduced in behalf of the plaintiff, and upon the trial of the action the evidence was confined to the cause of action set up in the defendant's counterclaim. It appeared that the troubles of the parties related to the refusal of the wife to sign papers which would enable the defendant to make an advantageous trade of some of his property and to a transaction in which the plaintiff had obtained possession of between $1,600 and $1,700 belonging to the defendant through signing some papers enabling the defendant to trade a piece of his property. Thereafter she persistently refused to sign papers to enable the defendant to sell or trade any of

his property, or to enable him to raise money for use in his business, or to save parcels thereof from threatened loss by foreclosure of liens against them. Plaintiff also refused to allow the defendant to have the use of any of the money in her possession for the payment of his debts or for use in his business.

In their domestic life, also, the evidence tended to show that the plaintiff had adopted an attitude toward the defendant and a course of conduct which made the defendant's life miserable. She neglected the cooking of his meals and at times refused to have any meals prepared. As to his bed and room, sometimes she would care for them and sometimes the defendant would be compelled to care for them himself. When the defendant, through an accident, lost part of his hand, the plaintiff treated him spitefully and maliciously, and declared, "That's good enough for him." While suffering from this injury she refused to nurse or care for him, prepared no food for him, and persisted in annoying and worrying him by humming and singing, though requested not to so spitefully abuse him while he was suffering and in great pain. Plaintiff persisted in such conduct and made it necessary for the defendant to secure others to nurse and care for him and to prepare his food. He was ultimately, after his recovery, forced to go to the home of his son for board. On one occasion plaintiff locked the door of the house against him, refused to open it, and when he forced the door he found that she had removed bedding from his bed and had placed it in her own bed. When the defendant went to her room for it she struck him, and because the defendant then slapped her she caused his arrest. Upon his confession to this act in court he was fined. The defendant was also arrested upon the plaintiff's complaint on the ground of nonsupport and was put under bonds to keep the peace. There was evidence that the plaintiff used vile and abusive language to the defendant in the presence of the minor children and spoke of

him in terms which tended to deprive him of their regard and respect. The defendant testified that the plaintiff took money from his pockets, was extravagant, and frequently accused him of infidelity.

During the trial the court questioned plaintiff's sanity, and thereupon she was examined by physicians and was declared sane by them. Upon being examined as to what disposition she had made of the $1,600 or $1,700 obtained from her husband, she claimed to have none of it and that she had used it for her support; but the evidence disclosed that shortly before the commencement of the action she had withdrawn $1,400 from banks.

The court found that the plaintiff had at least $1,200 of the defendant's money in her possession. It was also found from the evidence that the total value of the defendant's property, over and above incumbrances of $1,200 upon it, was $4,400, and that he owed unsecured debts to the amount of $1,400. The court found that an absolute divorce should be granted to the defendant, but, on the ground that a division of the property under the stipulation between the parties would be unjust to the creditors of the defendant, refused to make a final division of the defendant's property in accordance with the stipulation. The court directed in its findings that the household furniture should go to the plaintiff, except that the defendant might remove and have the furniture and bedding situated in the room occupied by him; that if the plaintiff should within thirty days turn over and pay to the defendant the $1,200 which she had retained out of the defendant's property, as above stated, then the stipulation for the distribution of the husband's estate should stand approved, but in case of her default to do so the stipulation should be disregarded and the husband's estate should then be distributed by awarding her this sum of money out of his estate and the household goods, as above specified; and that the defendant should pay the plaintiff $3 a week for the

maintenance of the minor children during their minority. One of these children was then seventeen years old and able to sustain herself. The other was five years old. Plaintiff did not pay over the $1,200 and judgment was entered accordingly. This is an appeal from the judgment.

J. M. Gooding, for the appellant.

For the respondent there was a brief by *Morse & Williams*, and oral argument by *D. O. Williams*.

The following opinion was filed April 5, 1910:

Siebecker, J. The court found that the allegations of the defendant's counterclaim were sustained by the evidence and awarded judgment thereon divorcing the parties. The plaintiff's contention is that this was erroneous because the facts found do not constitute cruel and inhuman treatment authorizing the granting of a divorce. The facts found clearly show that the plaintiff was guilty of wilfully and persistently causing defendant unnecessary suffering in body and mind, and that as a natural consequence thereof cohabitation with the plaintiff became dangerous to the defendant's health and subversive of the marriage relation by making it impossible for him to discharge the duties imposed thereby. Though the ill treatment may not be said to have operated directly on the body, it however was of a nature well calculated to inflict pain and suffering in body and mind, and thus to produce injurious results which made cohabitation dangerous to the defendant's health and life and to render it wholly impracticable for him to properly discharge his marital obligations. When the treatment of either spouse by the other so affects the injured party and the marriage relation, it is cruel and inhuman treatment in the law and constitutes grounds for a divorce. We think the facts found establish a good cause for a divorce, and that the court was justified in dissolving the marriage bonds.

It is claimed that the court erred in not approving the

stipulation of the parties for a final division and distribution of the defendant's property. It appears that the parties made this stipulation when the defendant did not know that the plaintiff still had $1,200 of his money in her possession. The husband's estate consisted of a homestead of an estimated value of $3,500; other real estate of an estimated value of about $2,900, which was incumbered by claims amounting to $1,200; personal property, aside from the household goods, of the probable value of $200; and the money which the plaintiff held. It also appears that the defendant owed $1,400 of unsecured debts. The stipulation awarded the plaintiff the homestead and obligated the defendant to pay the plaintiff $3 a week as support for the minor children, one of whom, at the time of the entry of judgment, was seventeen years of age and the other five.

Upon the trial of the cause the court expressed its disapproval of this division of the defendant's estate, but suggested that if the plaintiff would voluntarily pay the $1,200 cash in her possession to the defendant the stipulation would be approved. This the plaintiff refused to do. The court thereupon refused approval of the stipulated division of the defendant's estate and adjudged that the plaintiff be awarded the $1,200 in money and $3 per week for the support of the minor children during their minority, one of whom was then seventeen years of age and abundantly able to support herself. By this division the defendant retained his homestead and some personal property, the equity in his northern Wisconsin land, and a vacant lot in Ripon. While these equities are probably of some value to the defendant they cannot be held to amount in value to the estimated market value less the incumbrances, and it seems that by charging the defendant with these equities at a reasonable amount and with the other property allowed him, and deducting therefrom his present indebtedness, it will leave him, in round numbers, two thirds of his property, of a probable market value of not to exceed

$2,500. Out of this he must pay the costs and expenses of this litigation. We find this to be a just division of the defendant's estate, in the light of the fact that the divorce was granted because of plaintiff's misconduct toward and ill treatment of the defendant and of all the other accompanying facts and circumstances of the case. Upon the whole record the judgment of the circuit court must be approved.

The plaintiff moved this court for an allowance of suit money, temporary alimony, and support for the minor children. We consider that an allowance of $50 to her as suit money in prosecuting this appeal and a determination that she recover her disbursements for printing the case and brief will be just and equitable. The respondent is to pay the clerk's fees in this court.

By the Court.—It is so ordered.

A motion for a rehearing was denied October 4, 1910.

Massy, Administratrix, Appellant, vs. Milwaukee Electric Railway & Light Company, Respondent.

March 19—October 4, 1910.

Master and servant: Safe place to work: Electric wires: Fellow-servants: Vice-principal.

A distinct and independent employee of an electric light and power company to whom is delegated the duty to disconnect and make safe the wires on which other employees must work is ordinarily a vice-principal, and not a fellow-servant with the linemen and other like workmen.

Appeal from a judgment of the circuit court for Milwaukee county: Lawrence W. Halsey, Circuit Judge. *Reversed.*

On May 13, 1907, plaintiff's decedent, then twenty years of age, had been employed for a month as lineman's helper by the defendant, his work consisting in the handling of apparatus and materials to facilitate the lineman; deceased working on the ground and the lineman both on the ground and on the poles. Deceased had never handled live wires. On that date decedent's lineman and some other employees went to West Allis to readjust the wires and change brackets in a certain region. The wires included a "feed wire" ordinarily carrying electricity to the dangerous extent of 2,300 volts. Deceased and his lineman went to a substation where was an operator who controlled the switchboard connecting and disconnecting wires. They found there the assistant superintendent of the lighting department and requested that the feed wire might be killed during their operations; that is, disconnected from the current. They were informed that it was already dead, and in their presence the assistant superintendent directed the operator of the switchboard, Waldmann, not to turn electric current into that feed wire until he received direct word from the decedent's lineman. It appeared that a certain other employee, Dietz, having certain repairs or adjustments to make in the substation, had previously, the same day, requested Waldmann to disconnect this feed wire; that Dietz finished his job at about half-past 1 of the same day and notified Waldmann of that fact, remarking, "You can call up Commerce street, and tell him to put the current on the line again." Waldmann did so and switched into connection said feed wire, momentarily forgetting the instruction to keep the wire dead for the protection of the line crew of which deceased was one. Deceased at that moment, two or three blocks away, had hold of the wire with his bare hands and was instantly killed. At the close of the plaintiff's evidence a judgment of nonsuit was entered, from which the plaintiff appeals.

For the appellant there was a brief by *Houghton, Neelen*

& Houghton and *Samuel Wright,* and oral argument by *F. W. Houghton.*

Clarke M. Rosecrantz, for the respondent.

The following opinion was filed May 24, 1910:

Dodge, J. This case presents a situation not unfamiliar but of rather recent development since the greatly enlarged use of electricity transmitted over wires for the creation of light and power at various and remote places. There, as we know, men are constantly employed in stringing, connecting, repairing, and rearranging such wires, sometimes on one post and sometimes on another. When the wires on or about which such men must work are highly charged with electricity they endanger the men. The place of work becomes, in some degree, unsafe. On whom rests the risk from such danger if it is unreasonable? There are two well-established rules of the common law which in the early stages of industry were quite distinct and unlikely to conflict. We have, first, the rule that the employer owes the duty to provide a reasonably safe place to work and reasonably safe appliances to work with, and is liable for the proximate consequences to the servant from omission so to do. On the other hand, we have the rule that the employee assumes the ordinary risks of the business which he knows or, as an ordinary careful and intelligent man, ought to anticipate; among those risks is the likelihood of human infirmity in his fellow workmen, so that they may be careless. Hence the concrete rule that a master is not liable to his servant for negligence of a fellow-servant in the common employment.

As the size of industrial enterprises increased, complications arose. The master did not by his own hand build or equip the place for his employees nor even personally supervise the doing of such things, but hired men to do them: especially so in case of corporations, which can act only through some employee or delegate. The question at once presented

itself, Are persons so employed to perform the master's duty toward other employees fellow-servants of the latter within the rule above stated? and, broadly stated, the answer of the courts has been negative; but the line of distinction has been most difficult of definement and has been crowded to one side or the other of individual situations by different courts and sometimes by the same court without very clear coherence of reason. The layers of the track over which the trainmen are to run have been held to be fellow-servants in the common enterprise of operating the railway, instead of representatives of the master in performing the latter's duty to provide a safe track for the trainmen to perform the particular work of running their train. *Cooper v. M. & P. du C. R. Co.* 23 Wis. 668. The same view is held as to a switchman who fails to keep turned a switch and thereby allows a train to run upon a car-repairer at work on the switch. *Smith v. C., M. & St. P. R. Co.* 91 Wis. 503, 65 N. W. 183. Other situations located upon the same side of the line are *Okonski v. Pa. & Ohio F. Co.* 114 Wis. 448, 90 N. W. 429; *Williams v. Northern Wis. L. Co.* 124 Wis. 328, 102 N. W. 589; *Miller v. Centralia P. & W. P. Co.* 134 Wis. 316, 113 N. W. 954. Some cases presenting the antithetic condition where the negligent employee was held not to be a fellow-servant engaged in common undertaking, but the representative of the master in performing, or failing to perform, the latter's duty to the plaintiff, are *Cadden v. Am. S. B. Co.* 88 Wis. 409, 60 N. W. 800; *Eingartner v. Ill. S. Co.* 94 Wis. 70, 80, 68 N. W. 664; *McMahon v. Ida M. Co.* 95 Wis. 308, 70 N. W. 478; *Jarnek v. Manitowoc C. & D. Co.* 97 Wis. 537, 73 N. W. 62; *Zentner v. Oshkosh G. L. Co.* 126 Wis. 196, 105 N. W. 911; *Smith v. Milwaukee E. R. & L. Co.* 127 Wis. 253, 106 N. W. 829; *Rankel v. Buckstaff-Edwards Co.* 138 Wis. 442, 120 N. W. 269; *Halwas v. Am. G. Co.* 141 Wis. 127, 137, 123 N. W. 789.

It is undeniable that some of these decisions and many others in other jurisdictions have extended the meaning of

the community of service essential to co-employeeship vastly beyond the original conception of a relation which gave opportunity for mutual acquaintance and watchfulness between fellow-servants greater than exists between master and servant. We now confront an industry relatively new, at least in present development, where constantly employees must work in places which are rendered safe or unsafe by other agents or employees hired to do the determining act for the very purpose of creating the safety: employees with whom the exposed workmen have no contact or community save that both are employed to carry on the general business of generating and distributing the master's merchandise, as are traveling salesmen and the janitor or elevator operator in his master's store. Reasons which may have led to classing as fellow-servants men employed in conduct of railroads may fail to control situations in this field, though apparently closely analogous. One distinction is in the sudden and unavoidable nature of the peril from a failure to take the proper and easy precautions, as in this case. A man at one moment is handling a cold and harmless wire which it is the duty of his master to keep so; the next he is in contact with a deadly peril, unforeseeable and unescapable by reason of the act of another whom his master has employed to perform the duty resting on the latter to make and keep safe the place of work. We think reasons to hold that the persons so employed are agents performing a nondelegable duty are very apparent. We think, too, that they are recognized and applied in such cases as *Zentner v. Oshkosh G. L. Co., supra,* and *Smith v. Milwaukee E. R. & L. Co., supra,* and that they should control this situation, although no very clear distinction may exist in principle from *Williams v. Northern Wis. L. Co., supra,* and *Miller v. Centralia P. & W. P. Co., supra.* It is at least apparent that this court has not yet established by clear precedent how far the recognized principles of co-employment extend in their application to the particular situations existing in this industry.

They have, we think, been carried in some industries to the full extent compatible with either reason, public policy, or humanity, but such precedents should not lead to further extension to new conditions, even though a pretty close analogy appear. We hold, therefore, that a distinct and independent employee to whom is delegated the duty to disconnect and make safe the wires on which others must work is ordinarily a vice-principal and not a fellow-servant with the linemen and other like workmen. Whether Waldmann was such in this case was at least susceptible of affirmative answer by the jury, as also whether the place or appliances furnished decedent were rendered not reasonably safe by failure of the master's duty intrusted to Waldmann. It was error, therefore, to enter judgment of nonsuit.

By the Court.—Judgment reversed, and cause remanded for new trial.

A motion for a rehearing was denied October 4, 1910.

WILL OF PARKS.

April 5—October 4, 1910.

Wills: Undue influence.

The decision of the trial court, in a will contest, that the disinheriting of testator's adopted daughter was not induced by undue influence of his wife, is *held* not to be so clearly against the preponderance of the evidence as to warrant reversal.

APPEAL from a judgment of the circuit court for Milwaukee county: E. B. BELDEN, Judge. *Affirmed.*

An instrument purporting to be the last will and testament of Henry O. Parks, deceased, was, in due form, admitted to probate in the county court of Milwaukee county. *Lorena*

Ellen Parks, an adopted daughter of the testator, appealed to the circuit court, claiming she was prevented from being a beneficiary under the will and sharing in the distribution of the testator's estate by reason of undue influence exercised by his wife, in that she maliciously sought to pervert, and succeeded in perverting, the testator's mind as regards the contestant, by purposely misrepresenting her character in the family relations.

There was evidence to this effect: Appellant was adopted into the testator's family when she was about four years of age. She was the only child of the testator and his wife. She resided with them till she was eighteen years of age. She then induced her uncle, in New York, to invite her to visit him in order that she might have that as an excuse for ostensibly leaving her foster parents temporarily, while she in fact intended to leave them at least for a considerable length of time, and possibly, if not probably, permanently. As a result of the scheme she thus devised, she went to her uncle against the wishes of her foster parents. Not long thereafter she resumed her original family name and ceased to communicate with her foster parents by correspondence. She saw them, briefly, in Milwaukee about five years after she left their home and again about six years later in Chicago. After that she did not communicate with them, or either of them, till 1902, and about one year before such time the testator's wife died. A few days after appellant left the testator's home he made a will contemplating disinheriting her, by leaving his property to his wife and making her sole executrix without bonds. The day after the wife died he made the will in question in which he remembered appellant to the extent of $10, made some small charitable and other bequests, and gave the residue of his property to his and his wife's relatives. He lived about six years thereafter in the full possession of all his faculties, during which time he did not resume, or thereafter attempt to resume, to any extent,

parental attentions to the appellant, or she resume, or attempt to resume, the relations of a daughter. She attempted to regain her former position about a year after the death of her foster mother by writing the testator a letter. In it she tendered him the sympathy of a daughter, offered to hold herself in readiness to go to his assistance at any time he felt in need thereof, informed him that she was residing with her uncle, possessed a millinery business which she had conducted some six years and was yielding her a good income, offered to visit him soon if he desired to see her, solicited a reply, expressed a hope that he cherished no hard feeling towards her, made excuses for dropping his name, and implored him to overlook it. To that he replied, repulsing her, severely, for presuming to address him as her parent after conducting herself as she had toward him and his wife, stating that she had no right to his name or his regard; that her conduct had obliterated all the love and regard he once had for her, rebuked her severely for ill treating her foster mother and saddening her heart instead of being a blessing to her and him, as she might have been, chided her for waiting a year after her foster mother died before writing, admonished her not to come to him as her presence, instead of being a solace to him in his sorrow, would be a constant reminder of blighted anticipations which he preferred to forget as soon as possible; assuring her that while the day had passed forever for her to resume her place in his affections, he did not bear her any malice and forgave her for the unhappiness she had caused, as he received forgiveness for his own misdoings, and hoped to meet her in Heaven; admonished her not to endeavor to shift the blame on to her uncle for grossly insulting the testator by changing her name, when the fault was her own; and closed with the words: "Let this letter close our correspondence, for it only makes me nervous and only awakens memories that I desire to bury forever, if possible. Farewell. Your once loving father, H. O. Parks."

No sign of affection passed between appellant and the testator after the sending to her of that letter, up to the day of his death. She then seasonably appeared and endeavored to break his will by charging her foster mother with having treated her in a most cruel and inhuman manner during the whole of some fourteen years, none of which bad treatment came to the notice of the testator, the idea being to make it appear that the mother was guilty of gross inhumanity for that long period for the purpose of ultimately compelling appellant, in an apparently rebellious way, to leave the family abode, while the mother was studiously cultivating in the mind of the testator the idea that she was unworthy of his regard, which course she persisted in to the end, resulting in the two wills and the failure to change the last one, notwithstanding years lapsed after the wife died, before his decease. The testimony was to the effect that if there were any such ill treatment of appellant as she claimed, the testator was never conscious of it and that if his wife was unjust to her, either before she left the family or thereafter, he had not even a suspicion of it.

There was some evidence corroborating appellant's story and some evidence discrediting it.

The court decided that there was no credible evidence that the testator's wife wrongfully, consciously or otherwise, influenced her husband as to how he should leave his property by will, and that the long lapse of time intervening between the death of his wife and his death, during which he was perfectly free to make any change in his will which he might desire to make without any change being made, was conclusive, under all the circumstances, that he left his property as he desired to leave it, and that the will was valid. Facts appropriate to that view were found and filed, and judgment was rendered accordingly.

Daniel W. Hoan, for the appellant.

For the respondent there was a brief by *A. G. Weissert,*

attorney, and *Charles M. Morris,* of counsel, and oral argument by *Mr. Weissert.*

The following opinion was filed April 26, 1910:

MARSHALL, J. The foregoing contains a general statement of the case as it was submitted for decision. It is in as much detail as seems to be necessary. There are no disputed questions of law involved which require discussion. The sole question tried was whether undue influence was used by the testator's wife, inducing him to disinherit appellant when he, otherwise, would not have done so. The trial court, as indicated, found the facts, in that regard, in favor of proponent. In coming to that conclusion correct rules of law were applied to the evidence. If any errors were committed they were in finding in favor of proponent on the vital fact in issue, though the evidence called for a finding in favor of appellant. So the sole question for discussion here is, Does the evidence clearly preponderate against the trial court's decision on such vital matter? It is considered that such question must be answered in the negative. To thus state the conclusion is sufficient for the case. A lengthy opinion might be written, analyzing the evidence and pointing out the probabilities upon one side and upon the other, and demonstrating that there is no clear preponderance in favor of appellant, especially when due weight is given to the opinion of the trial judge who enjoyed the superior advantages of seeing and hearing the witnesses. But such lengthy discussion of the evidence would be merely uselessly incumbering the official reports of the court, since such discussion would not shed any valuable light on how any subsequent case should be decided. Neither would such discussion afford appellant the solace sometimes furnished by an opinion, since it would only tend to spread upon the record, in minute detail, reasons why the trial court regarded her evidence self-destructive and incredible. Judicial charity, so to speak, for the appellant

who has failed in her effort to break her foster father's will, may be better extended by omitting to give in the official report of this case, her evidence in detail, and the reasons which the trial court deemed sufficient to preclude giving credence to it, and which we are unable to conclude were clearly wrong, if wrong at all.

By the Court.—The judgment is affirmed with costs against appellant, not to be paid out of the estate.

Upon a motion for a rehearing there was a brief for the contestant by *Daniel W. Hoan,* attorney, and *Michael Levin,* of counsel.

The motion was denied October 4, 1910.

Munkwitz Realty & Investment Company, Respondent, vs. City of Milwaukee, Appellant.

April 6—October 4, 1910.

Vendor and purchaser of land: Grantor continuing in possession: Trespass: Recovery for use and occupation: Municipal corporations: Implied contracts.

1. A grantor who continues in possession of land without demand by the grantee for possession holds in subordination to the grantee's title, and is not liable as a trespasser prior to a refusal to deliver possession on demand.
2. Sec. 2196, Stats. (1898), permitting recovery by a landlord for the use and occupation of lands or tenements under any agreement not made by deed, requires that there must be an agreement express or implied.
3. Where a city after conveying certain premises continued to use and occupy them without any agreement, express or implied, to pay rent, the grantee cannot recover for such use and occupation.

[4. Whether in such a case the city could be bound by an implied contract to pay rent, not determined.]

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The action is to recover for the use and occupation of a building in the city of *Milwaukee* from June 1, 1906, until February 1, 1907. The facts are not in dispute. The city owned the building and the lot on which it stood prior to May 24, 1906, and used it for the accommodation of the meter department of the city waterworks system. On the last-named date the city sold and conveyed the property to the Light Horse Squadron Armory Association, and on the following day the grantee sold and conveyed it to the plaintiff, which has ever since owned it. The water department of the city continued to occupy the building until February 1, 1907, without lease and without permission or authority of the plaintiff or demand for rent. The complaint charged that the city entered upon and had the use of the property for the time stated to the damage of the plaintiff in the sum of $800, alleged that plaintiff waived the defendant's tort, and that such use and occupation was reasonably worth $800, for which sum judgment was demanded. There was a jury trial; the jury in answer to a special question found the damages to be $560; and the court rendered judgment for the plaintiff for this sum, from which judgment the defendant appeals.

For the appellant the cause was submitted on the brief of *John T. Kelly,* city attorney, and *Clinton G. Price,* first assistant city attorney.

For the respondent there was a brief by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *C. F. Fawsett.*

The following opinion was filed May 24, 1910:

WINSLOW, C. J. This is an action to recover for the use and occupation of real estate. The judgment seems to have been based on the ground that the city was a trespasser during its occupancy and that the plaintiff has chosen to waive

the tort and recover upon implied contract. The difficulty with this theory is that we can discover no trespass. The authorities are numerous to the effect that where, by the laches of the grantee, a grantor holds possession after his conveyance he holds as a tenant at sufferance. 1 Washb. Real Prop. (6th ed.) § 826; 18 Am. & Eng. Ency. of Law (2d ed.) 178, note 1, and authorities cited. It may be doubtful whether this would be so in Wisconsin since the decision of the cases of *Meno v. Hæffel,* 46 Wis. 282, 1 N. W. 31, and *Eldred v. Sherman,* 81 Wis. 182, 51 N. W. 441, which decide that a tenant holding over after his term does not become a tenant at sufferance unless the landlord expressly or impliedly admit that the relationship of landlord and tenant continues. It seems unnecessary to decide this question, however. The continued occupation of the property was not adverse to the grantee's title, but in subordination thereto. *Schwallback v. C., M. & St. P. R. Co.* 69 Wis. 292, 34 N. W. 128; *Riha v. Pelnar,* 86 Wis. 408, 57 N. W. 51. Under such circumstances the grantor does not continue in possession as owner, but is estopped from denying his grantee's title. And in *McCormick v. Herndon,* 86 Wis. 449, 56 N. W. 1097, it is said that he holds as tenant for his grantee and will be treated as holding the premises in subserviency to his grantee until he makes an explicit disclaimer of such relation. Under any theory, therefore, we can see no ground for holding that the city was a trespasser prior to a refusal to deliver possession on demand; hence there was no recovery justified on the ground that a tort had been committed. But we do not think the judgment should be reversed because the complaint is framed on the theory of a tort if the undisputed facts show a liability upon contract, so long as it appears that the parties have not been misled and the defendant has lost no rights.

Our statute provides that "any landlord may recover a reasonable satisfaction for the use and occupation of any lands or tenements by any person under any agreement not made

by deed." [Sec. 2196, Stats. 1898.] This statute is in substance the same as sec. XIV, c. XIX, 11 Geo. II., which was originally passed to obviate an ironclad rule of the common law to the effect that there could be no action in *assumpsit* for rent except upon express promise made at the time of the demise.

This statute was under consideration in *Ackerman v. Lyman,* 20 Wis. 454, which was an action for use and occupation of lands by one who was originally a trespasser, and it was held that the action for use and occupation in this state rests on this section, and that the section requires that there must be an agreement, express or implied, and that it may be implied from the defendant's entering into possession by permission of the plaintiff, or from acts showing the assent of the defendant after a tortious entry to hold under the permission of the plaintiff. It was in effect followed in *De Pere Co. v. Reynen,* 65 Wis. 271, 22 N. W. 761, 27 N. W. 155, where it was held that an action for use and occupation does not lie unless the relation of landlord and tenant exist between the parties. It is in harmony, also, with *Preston v. Hawley,* 101 N. Y. 586, 589, 5 N. E. 770, and with numerous cases cited in 2 Ency. Pl. & Pr. 1026, note 2. See, also, Keener, Quasi-Contracts, 191, 192.

There are no facts shown here from which an agreement to pay rent can be implied, even granting that the city could be bound by an implied contract in any event, a proposition which is, to say the least, doubtful. *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; *Appleton W. W. Co. v. Appleton,* 132 Wis. 563, 113 N. W. 44. The conclusion is that there can be no recovery either upon the theory of tort or the theory of contract.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint.

The respondent moved for a rehearing or for a modifica-

tion of the judgment and mandate by changing the judgment of reversal to one of affirmance.

For the respondent there was a brief in support of the motion by *Winkler, Flanders, Bottum & Fawsett,* and for the appellant a brief by *Daniel W. Hoan,* city attorney, and *W. H. Timlin, Jr.,* special assistant city attorney.

The motion was denied October 4, 1910.

Will of Battis: Battis, Appellant, vs. Montaba, Respondent.

April 9—October 4, 1910.

Wills: Implied revocation of bequest: Jurisdiction of county court: Effect of divorce: Evidence as to intent.

1. After the admission of a will to probate the county court may, on petition, determine whether a certain bequest made therein had been impliedly revoked by subsequent changes in the condition and circumstances of the testator.
2. A divorce accompanied by a final division of the husband's property is such a change in his condition and circumstances as impliedly revokes a provision which he had made in his will for his wife's benefit.
3. In case of such an implied revocation of a will or of a portion thereof, evidence that the testator meant the will to stand as written cannot be received unless it shows a republication.

Appeal from a judgment of the circuit court for Winnebago county: Chester A. Fowler, Judge. *Reversed.*

On April 28, 1890, Allan P. Battis and the respondent were married. On December, 13, 1902, Allan P. Battis, the testator, made his will. Thereby he gave to a cousin all his interest in his boiler-shop business, the buildings in which it was conducted, and the lots upon which the buildings stood. He gave to Helen Wiesenberg, a stranger, certain bank stock and money or real-estate mortgages sufficient to make the

sum of $8,000. The fourth and fifth paragraphs of the will are as follows:

"Fourth. I give and bequeath unto my wife *Frances May Battis,* of the city of Oshkosh, the sum of ten thousand dollars. To have and to hold the same unto her, the said *Frances May Battis,* her heirs, executors, administrators and assigns forever.

"Fifth. I hereby give, devise and bequeath unto my brother, *Martin T. Battis,* of the city of Oshkosh, all the rest, residue and remainder of my property of every name and nature, real, personal or mixed, to have and to hold the same unto him the said Martin T. Battis, his heirs, executors, administrators and assigns forever."

On July 5, 1903, the respondent secured a divorce from Allan P. Battis on the ground of cruel and inhuman treatment. The judgment provided that the plaintiff should retain the piano and household furniture, and that the defendant should pay her her disbursements and $2,500 "as her full and final share and allowance in the final division and distribution of the estate and property, real and personal, of the defendant, and that the plaintiff upon payment of said" sum should be "divested of all right, title, and interest in and to the property of the defendant, either real or personal." Subsequent to the divorce Allan P. Battis visited at the home of his former wife, manifested a solicitude for her health and happiness, and made her small gifts. He also sustained friendly relations with her mother and family, visited regularly at the home of her mother and sister, made presents to them, and stated to them that he had made such provision in his will for his former wife that she would not suffer from want. To the knowledge of Allan P. Battis, his former wife married Abe Montaba. On January 16, 1907, Allan P. Battis was sick and addressed a letter to his former wife's mother, expressing a desire to see *Frankie* before he died, asked that she be given his regards, and wished her good luck as long as she lived. Allan P. Battis died May 4, 1908, leaving no

brothers or sisters except the brother *Martin T. Battis,* and no widow or issue.

The will was admitted to probate. The executor complied with some of the provisions of the will, and, while he still had some $50,000 in his hands for distribution, the residuary legatee, the brother of the deceased, petitioned the county court to have it adjudged that the divorce and the final distribution of the estate and property of Allan P. Battis in 1903 had annulled and revoked the fourth paragraph of his will, and that the residue of the estate, after compliance with the other provisions of the will, should be awarded to the petitioner. The county court entered judgment adjudging that the bequest to the respondent was annulled by the divorce and final division and distribution of the estate and property of Allan P. Battis and that *Frances May Montaba* should take nothing under the will. Upon appeal to the circuit court the court entered judgment dismissing the petition. This is an appeal from the judgment of the circuit court.

For the appellant there were briefs by *Weed & Hollister,* attorneys, and *Charles Barber,* counsel, and oral argument by *Mr. H. I. Weed* and *Mr. Barber.*

For the respondent there was a brief by *Eaton & Eaton,* and oral argument by *M. H. Eaton* and *F. J. Eaton.*

The following opinion was filed April 26, 1910:

Siebecker, J. The respondent avers that the admission of the will to probate precludes the appellant by his petition from invoking the power of the court to declare the fourth paragraph of the will to have been revoked and annulled. The argument is made that the admission of the will to probate established the whole writing and made it operative and effective in all its parts, and hence that appellant cannot in this manner establish a revocation of any part thereof. The question raised by the petitioner is whether or not paragraph 4

of the will was revoked by the judgment awarding a divorce between the husband and wife, and, pursuant to sec. 2364, Stats. (1898), a final division and distribution of the testator's estate. No attempt is made to annul the probate of the will or to have the will declared ineffective because of its revocation. It need not, therefore, be determined whether this proceeding would lie to assail a will in its entirety after probate. The inquiry for determination is whether this is a proper and appropriate proceeding wherein the court may ascertain whether or not paragraph 4 of the will was revoked by the subsequently changed condition and circumstances of the testator respecting his relations to his divorced wife. This in no way affects the validity of the other parts of the will, its execution, or the admission to probate. Manifestly the writing probated embodies the will of the testator. If paragraph 4 is found to have been annulled under the condition and circumstances submitted to the court, all the other parts of the writing will stand as the will of the testator. In the proceeding admitting the will to probate the question actually presented to the court was whether the writing propounded as decedent's will was entitled to probate, and no other question was presented. The determination of this question in no way specifically included a determination respecting the annulment of paragraph 4. The legal effect and the validity of the contents of the writing are not involved. As a matter of practice, such questions are usually considered separately in probate and administration proceedings. *Farmer v. Sprague*, 57 Wis. 324, 15 N. W. 382. The statutes impose on the county courts the duty of ascertaining what persons are entitled to receive a testator's estate under his will. This necessarily involves a determination of whether any part of the writing presented as the will should be rejected as annulled, in order that distribution of the estate may be directed pursuant to the effective parts of the writing. This proceeding appropriately presents these considerations

to the court. We are therefore of opinion that appellant's petition was properly entertained, and that the court thereby acquired jurisdiction to determine whether this paragraph of the written paper admitted to probate as the will had been impliedly revoked and annulled under the provisions of sec. 2290, Stats. (1898), by the changed condition and circumstances of the testator subsequent to the making of the will.

This section enacts that no will shall be revoked except as therein provided, with the intention of revoking it; "excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." In *Will of Ward,* 70 Wis. 251, 35 N. W. 731, it was held that this exception from the operation of this section "manifestly means such as had previously been implied at common law." *Will of Lyon,* 96 Wis. 339, 71 N. W. 362; *Glascott v. Bragg,* 111 Wis. 605, 87 N. W. 853. These cases call attention to the fact that in the common law the marriage of a female, and the marriage and birth of issue in case of a man, were recognized as "subsequent changes in the condition or circumstances of the testator," which implied a revocation of the will. The appellant contends that this exception was not intended to be limited to those cases which had arisen for adjudication in the courts prior to the adoption of the statute law of this state, but that the statute is declaratory of a rule of justice imposed on testators respecting the disposition of their property by will in the light of their relations and duties toward persons who would naturally be the objects of their bounty. The decisions of the courts of this country are not in harmony as to the application and scope of the rule. There has been much discussion of the subject in various jurisdictions, and we call attention to the foregoing cases in this court and the following recent adjudications in other jurisdictions: *Lansing v. Haynes,* 95 Mich. 16, 54 N. W. 699; *Wirth v. Wirth,* 149

Mich. 687, 113 N. W. 306; *Baacke v. Baacke,* 50 Neb. 18, 69 N. W. 303; *Estate of Brown,* 139 Iowa, 219, 117 N. W. 260; *Donaldson v. Hall,* 106 Minn. 502, 119 N. W. 219. What subsequent changes in the condition and circumstances of the testator revoke a will or a part thereof by implication, within the rule embodied in this statute, has commonly been applied to a change in the testator's property, in his family, or in the beneficiaries. See note to *Graham v. Burch,* 28 Am. St. Rep. 339, 356 (47 Minn. 171). The rule rests on the idea that the changed condition and circumstances of the testator respecting his property, his family, or beneficiaries, imposing different moral and legal duties, affords strong evidence that the testator intended that his will should become revoked as to the provisions affected by such subsequent change in the testator's condition and circumstances.

Is the change in the condition and circumstances of one who has made a will, brought about by a divorce accompanied by an adjudication making a final division and distribution of his estate, both real and personal, as between him and his wife, in the light of their legal and equitable rights, their character and situation under all the circumstances of the case, of such probative force as to sustain the conclusion that the husband intended that the provision he had theretofore made in his will for his wife's benefit should be revoked thereby? The change in the condition and circumstances of a testator incident to a separation of the parties and a division and distribution of the husband's estate operates to produce a complete destruction of their legal and moral relations and consequent obligations and duties. It is difficult to conceive of a condition and circumstances which are pregnant with as strong an intent to annul the testamentary provision made for the benefit of a testator's wife and from which he would be led to conclude that the wife's claim upon his estate and his bounty had been fully discharged. These changed conditions and circumstances of a testator are of a nature which natu-

rally implies a different intent respecting his wife as the object of his bounty. The decree divorcing them and awarding a final division and distribution of his estate makes them strangers to each other, and the bestowal on her of such a portion of his estate as he ought in justice and right under the conditions and circumstances to bestow on her operates to discharge all his moral and legal duties toward her. It was upon such considerations that courts acted in establishing the doctrine of implied revocation of wills. The changed condition and circumstances of a testator thus brought about are of a nature and, in effect, of such probative force as to imply that the testator intended that the testamentary provisions theretofore made for the wife should become revoked thereby.

At the trial respondent offered evidence to show that after the divorce the testator entertained a friendly feeling for his former wife and did things evincing affection for her, and that he declared to her mother and sister that he had made provision in his will for her comfort and needs for the remainder of her life. It is contended that this evidence was competent to rebut any presumption of implied revocation of the provision made for her in the will. In many of the earlier English and American cases the right to rebut the presumption of such revocation was recognized. In recent times, however, this right has been denied in many cases. An exhaustive and full discussion is found in *Brush v. Wilkins,* 4 Johns. Ch. 506; *Marston v. Roe,* 8 A. & E. 14, and cases cited above. In *Glascott v. Bragg,* 111 Wis. 605, 607, 87 N. W. 854, this court in commenting on this phase of this question stated:

"The earlier cases seemed to go upon the theory that such 'marriage and birth raised a mere presumption of an intent to revoke, but the rule held in the later cases was finally confirmed in the Privy Council in the last case cited (*Israell v. Rodon,* 2 Moore P. C. 51), where it was expressly held that 'marriage and birth of a child do not afford presumptive evidence of intention to revoke, but are in themselves an abso-

lute revocation of a will made previous to the marriage but not in contemplation of it.' "

This declaration gives approval to the rule that must be deemed to have been applied in the case then under consideration. We have discovered no good and sufficient reason to depart from the rule thus applied in this court, and hence must hold that evidence cannot be received to rebut the presumption of an implied revocation of the provision in a will, or to show that the testator meant his will to stand as written, unless such evidence amounts to a republication of it. It is not claimed that the evidence offered shows that the testator republished his will after being divorced from his wife. In *Wirth v. Wirth,* 149 Mich. 687, 113 N. W. 306, the question was presented to the court in a case like the instant one. The holding of the court is stated in the headnote, as follows:

"A divorce and settlement of their property rights between husband and wife operates *ipso facto* to revoke his will previously made, and no subsequent act of the testator not accompanied by the solemnities requisite for the making of a valid will will revive it."

The evidence offered by the respondent is not proof that the testator revived the provision in the will which had been revoked by the divorce proceeding.

These considerations lead to the conclusion that the circuit court erred in dismissing the proceeding on the petition of *Martin T. Battis.*

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with directions that the court enter judgment affirming the judgment of the county court of Winnebago county.

Upon a motion for a rehearing there was a brief for the respondent by *Eaton & Eaton,* attorneys, and *Collins & Eaton,* of counsel; and for the appellant a brief by *Weed & Hollister.*

The motion was denied October 4, 1910.

LUTIEN and others, Appellants, vs. CITY OF KEWAUNEE and others, Respondents.

April 27—October 4, 1910.

Municipal corporations: Annexation of territory: Failure to comply with statute: Pleading: Remedy: Injunction: Limitation of actions: Oral demurrer: Appeal: Harmless errors.

1. An averment in a complaint that an ordinance of annexation "was not published in accordance with law" states a legal conclusion.
2. An averment that in making such annexation the city authorities acted upon a petition which was not signed by a majority of the electors and the owners of one third of the taxable property in the district sought to be annexed according to the last tax roll including that district, sufficiently asserts that the annexation was unauthorized.
3. The proper remedy in such case is a class action in equity by the property holders and taxpayers in the territory sought to be annexed.
4. No rule of law or equity forbids the court to entertain a suit to enjoin the acts of public officers injurious to the plaintiffs, attempted to be done under an invalid ordinance or statute.
5. An oral demurrer to a complaint does not raise the objection that the cause of action is barred by limitation.
6. Where it appears on the face of the complaint that the cause of action is so barred, and the statute of limitation is pleaded in the answer, the appellant is not prejudiced by the ruling sustaining an oral demurrer and dismissing the complaint. In such case the judgment will be affirmed, with leave to the plaintiff to apply to the court below to amend his complaint and plead other facts, if any exist, in avoidance of the bar of the statute.

APPEAL from a judgment of the circuit court for Kewaunee county: MARTIN L. LUECK, Judge. *Affirmed.*

For the appellants there were briefs by *George W. Wing* and *Cady, Strehlow & Jaseph,* and oral argument by *F. C. Cady.*

For the respondents there was a brief signed by *W. A. Cowell* and *Nash & Nash,* and oral argument by *A. L. Nash.*

The following opinion was filed May 24, 1910:

TIMLIN, J. The appellants, averring that they are owners of real estate forming part of the territory attempted to be annexed to the city of *Kewaunee*, but not expressly stating that they are taxpayers, allege that they brought this suit in equity for themselves and in behalf of all other property owners and taxpayers similarly situated. The relief sought was to enjoin the city officers from levying any tax upon the said real estate of the plaintiffs and from exercising any acts of jurisdiction over the territory sought to be annexed, and that the city clerk be enjoined from making out and delivering to the said treasurer a tax roll and tax warrant including said real estate of the plaintiffs therein, and that the city treasurer be enjoined from collecting or attempting to collect taxes on said lands, etc. The wrong alleged to have been committed against plaintiffs is that the city attempted to annex certain described territory containing the lands of the plaintiffs and bring this within its corporate limits, but acted upon a petition which was not signed by a majority of the electors and the owners of one third of the taxable property in the district sought to be annexed according to the last tax roll including that district. Other alleged errors are that the petition for annexation purported to be signed by certain corporations which had never authorized any person or persons to affix their several signatures, and that the ordinance of annexation "was not published in accordance with law;" also that the annexed territory was not adjacent to the city, was not necessary for building, street, or other municipal purposes, was almost exclusively agricultural lands sparsely settled or lands wholly unoccupied, and annexation was attempted to be made for the sole and only purpose of increasing the revenue of said city by taxing the property so annexed. It is also averred that the taxes of the plaintiffs will be increased by such annexation.

When the cause came on for trial the defendants objected to any evidence being received to prove the averments of the complaint, because facts sufficient to constitute a cause of action were not averred, and because the complaint sought to set aside and annul what had been done by legislative power, a thing which the court had no jurisdiction to do. The learned circuit court sustained the objection, excluded the evidence, and judgment was rendered for the defendants. The objection and exception were preserved by bill of exceptions, and the plaintiffs appealed from the judgment.

We do not think the ruling of the learned circuit court can be supported on the ground that the plaintiffs have mistaken their remedy, or that the power of the court cannot be invoked to restrain the acts of municipal officers who attempt to proceed to the damage of the plaintiffs under an ordinance invalid for failure to comply with the statutory conditions precedent to the enactment of such ordinance. This is not a suit to arrest the act of legislation while in progress, but to restrain official acts attempted to be exercised under the authority of an invalid ordinance. The same question has been many times passed upon when officers are restrained from acting under an unconstitutional statute. In *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 614, 14 N. W. 844, in a suit in equity to set aside taxes, the validity of acts of the legislature changing the boundaries of a county and dividing it into towns and providing for their organization was examined into, but the case finally turned upon the point that the officers levying the tax were officers *de facto* and their official acts under these statutes could not be inquired into collaterally. In the instant case the plaintiffs seek to prevent alleged unlawful action under color of office. In *Smith v. Sherry,* 54 Wis. 114, 11 N. W. 465, which is an action for trespass to land, where the plaintiff claimed title under a tax deed, the acts of the county board in detaching territory from one town and adding it to another were examined into and

held invalid; and a like investigation was made in *Chicago & N. W. R. Co. v. Oconto,* 50 Wis. 189, 6 N. W. 607, where the action was to recover back money paid for taxes. *Earles v. Wells,* 94 Wis. 285, 68 N. W. 964, was a suit in equity by the owner of property within the city subject to taxation to enjoin the defendants from acting under an invalid ordinance, and the complaint also asked to have the ordinance declared null and void because it created a liability on the city in excess of the constitutional limit of municipal indebtedness. The suit was sustained. In *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 98 N. W. 969, the action was by persons suffering a special injury not common to the whole public to declare certain ordinances void and restrain action thereunder, and the distinction is pointed out between actions of this kind where the plaintiff suffers or will suffer from the enforcement of the void ordinance an injury special or peculiar to himself and not common to the public in general, and those in which the injury or damage affects the public. The same kind of action by one specially affected was maintained in *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885; and similar authorities are cited by appellant as follows: *Mayor v. Radecke,* 49 Md. 217, 33 Am. Rep. 239; 2 High, Injunctions, § 1254; *Pittsburg's Appeal,* 79 Pa. St. 317; *Delphi v. Startzman,* 104 Ind. 343, 345, 3 N. E. 937; 20 Am. & Eng. Ency. of Law (2d ed.) 1154; 28 Cyc. 212.

Cases like *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57, or *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851, and similar cases, are not in point here, for this suit is to restrain unauthorized action of municipal officers specially injurious to the plaintiff and his class and there is no other adequate remedy. *Certiorari* would not reach the question of the number of electors and landowners in the annexed district. *Quo warranto* is manifestly inappropriate, and, in short, the remedy is in equity, as amply shown by the foregoing authorities.

We consider the statement of defective publication a conclusion of law and insufficiently pleaded, but the averment that the petition upon which the city council acted was not signed by a majority of the electors and the owners of at least one third of the taxable property in the territory attempted to be annexed according to the last tax roll to be a good pleading of the statute (sec. 925—18, Stats. 1898, as amended by ch. 124, Laws of 1907), which provides:

"A majority of the electors and the owners of at least one third of the taxable property according to the last tax roll, in the territory adjacent to such city may together present a petition to the common council of such city, asking for annexation thereto."

Sec. 925—19, Stats. (1898), provides that "at any regular meeting of the common council after the filing of said petition with the city clerk an ordinance may be introduced providing for the annexation of such adjacent territory." Sec. 925—17 provides that territory lying adjacent to any city may be annexed to such city in the manner thereinafter set forth. The pleading in this respect sufficiently negatived compliance with the statute on the part of the city attempting to make the annexation, and the statute makes such compliance a condition precedent to the exercise of the power of annexation.

Were this case to end here, a reversal of the judgment of the court below would be inevitable, but sec. 925—21, Stats. (1898), relating to the same subject, declares:

"The adoption of said ordinance shall operate to annex such territory to said city and to the ward or wards designated therein ninety days after the same is passed and published. The validity of the proceedings annexing such territory shall not be called in question collaterally in any court of this state, nor be called in question in any other manner in any such court unless the action or proceeding therefor be commenced within ninety days after such ordinance is adopted."

A somewhat similar statute prescribing the same length of time was construed and applied in *Application of Clark,* 135

Wis. 437, 115 N. W. 387. Sec. 925—21, Stats. (1898), is peculiar, however, in the respect that upon the adoption of the ordinance it does not go into force or operate to annex the territory to the city until ninety days after the ordinance is passed and published. During ninety days after its adoption, without reference to the time of publication, any person legally injured by such adoption may bring the proper suit to defeat the annexation and call in question the validity of the ordinance. But ninety days after such ordinance is adopted the time for calling it in question expires whether publication is defective or not, and even if no publication has taken place.

The complaint in this action avers "that since said pretended annexation of said territory to said city the assessor of the defendant city of *Kewaunee* has pretended to assess the real estate of said plaintiffs," etc.; also, that the aldermen threaten and are about to levy taxes on said real estate, and that the city clerk threatens and is about to make out a tax roll and warrant. These averments relate to acts done pursuant to attempted annexation which could only have been done after three months had expired from the passage and publication of the ordinance. The annexation is spoken of as a past fact; that is to say, acts are alleged to have occurred "since the pretended annexation." How can we say that this means since the pretended passage of the ordinance? And yet, unless it means this, the complaint shows on its face that more than three months had elapsed from the date of the passage and publication of the ordinance, because it showed that the pretended annexation had been completed and existed as an accomplished fact, although not legally accomplished. The answer pleads this short statute of limitations. The oral demurrer does not of itself raise the defense of the statute of limitations. But the record returned on appeal *prima facie* shows that the appellant is in no wise aggrieved or injured by the dismissal of the complaint by the circuit court, because that same dismissal must inevitably result upon the facts now before us. The statute forbids us to reverse in such case.

Ch. 192, Laws of 1909. If, however, there are any facts in avoidance of this statute of limitations, the plaintiffs should be permitted by the circuit court, upon the return of this record, to file an amended complaint setting forth such matter in avoidance. Otherwise the judgment dismissing the complaint will be affirmed. The judgment is therefore affirmed subject to the right of the plaintiff to have the judgment reopened by the circuit court and an amended complaint filed upon a showing of facts sufficient to avoid the bar of the statute, which otherwise appears to conclude his action.

By the Court.—Judgment affirmed, and cause remanded for further proceedings according to this opinion.

The following opinion was filed October 4, 1910:

Timlin, J. On motion for rehearing the plaintiffs contended that the statute limiting the time of attack to ninety days was unconstitutional on various grounds, *inter alia* that the preliminary publication required by sec. 925—19, Stats. (1898), had not been given or had not been properly given.

If this publication was not made that is a matter for the plaintiffs to set forth in avoidance of the statute in their amended complaint as specified in the opinion of the court. The plaintiffs should present this case on a proper complaint as indicated in the opinion, raising all the questions which they now seek to present on rehearing.

By the Court.—The motion for a rehearing is denied, with $25 costs.

OBORN, Plaintiff in error, vs. THE STATE, Defendant in error.

April 20—October 4, 1910.

CRIMINAL LAW AND PRACTICE. (1–9) *Waiver of irregularities and of constitutional rights: Jury trial: Change of venue: Former jeopardy: Discharge of jury.* (10) *Evidence: Opinions: Form of hypothetical questions.* (11–15) *Witnesses: Competency: Right to meet witnesses face to face: Wife as witness: Effect of divorce.* (16–20, 22, 23, 26) *Insanity: Evidence: Competency: What is legal "insanity:" Epilepsy.* (21, 25) *Instructions to jury.* (24) *Homicide.* (27, 28) *Jury: Isolation.* (29) *Appeal: Error: Prejudice not presumed.*

1. The constitutional guaranty of trial by jury and the statute as well entitle one, charged with having committed a criminal offense, to a trial by a jury of twelve men selected according to law, from the county where the crime is claimed to have been committed, and to have all issues, including that of insanity, tried in such county and by the one jury.
2. The right to a change of venue in a criminal case, depends upon statute and can only be claimed in the manner and upon the ground provided.
3. The rule that the right to a change of venue in a criminal case is purely statutory, does not exclude the idea that a change by consent is proper.
4. An accused person in a criminal case is competent to waive irregularities and rights, whether constitutional or statutory, very much the same as a party may in a civil action.
5. One accused of crime is competent to waive any irregularity or right, constitutional or statutory, except in a capital case the right of trial by a jury of twelve men, and that extends to waiver of the right of trial by a jury of twelve men competent to act as jurors.
6. The right to a jury trial and that to a trial in the county of the offense and the one to have all the issues tried before a single jury, are subject to waiver by the accused.
7. If one is put in jeopardy as regards a criminal charge, the jeopardy is subject to supersession where the ends of justice require the jury to be discharged and another jury to be impaneled to try the case.
8. In case the trial judge, in the progress of a trial, because of any emergency, concludes that it is imperatively necessary for him to suspend the trial indefinitely, and especially if counsel for

the accused concurs in that view without protest by the accused brought to the attention of the court, and in such situation the jury is discharged, leaving the trial to be taken up again before another jury, the jeopardy created by the partial trial is thereby wholly superseded.

9. In case of an accused person, after having been put in jeopardy, taking or consenting to any proceeding rendering necessary a new or additional trial in order to fully conclude the case, he cannot in such further trial successfully claim immunity on the ground of former jeopardy created by the first proceeding.

10. Counsel who calls a witness to testify within the field of opinion evidence, may frame his question upon such hypothesis as he thinks is reasonably warranted by the evidence, aiming to reasonably cover an entire situation, so warranted, subject to the opinion of the court as to competency.

11. On the question of competency, the interrogatory to the expert is not to be condemned because not warranted from the viewpoint of adverse counsel, since each party may take and have presented to the jury any reasonable position, in the judgment of the court, by propounding to witnesses such party's own hypothesis, leaving the weight of the answer to the jury and to turn, in part at least, on whether such hypothesis presents the true state of the case.

12. The decision of the trial court on the question of competency, is not to be disturbed on appeal unless it not only appears clearly wrong but that, had the error not occurred, the result of the trial might, within reasonable probabilities, have been materially more favorable to the complaining party.

13. The constitutional guaranty of the right of the accused person in a criminal prosecution to meet the witnesses face to face, does not extend to mere official authenticators of official documents offered in evidence on the subject of competency of a person produced as a witness to testify.

14. A judgment of divorce, so far as *in rem*, is conclusive on the whole world as to the status of the parties being, from that time, single as to each other, but does not settle the status of their prior relations so as to render them, as to the whole world, valid regardless of whether they were so in fact or not.

15. The rule precluding a husband or wife from being a witness for or against each other, or from disclosing confidential communications, contemplates the existence of a valid marriage.

16. Whether evidence of conduct of a person after the fact, in a criminal prosecution, is admissible on the question of whether such person was legally sane at the time of such fact, depends upon whether such conduct bears such relation to such person's former condition of mind as, in reason, to be worthy of consideration in respect thereto.

17. If the question of fact last suggested is decided in favor of admissibility, then the, rather miscalled, discretionary power, which is, really under the circumstances, power to judge as to the fact, is exhausted and there is no discretion as to whether to allow or not to allow the evidence; it is admissible as matter of right.
18. The term "insanity," in the law, means such an abnormal condition of the mind, from any cause, as to render the afflicted one incapable of distinguishing between right and wrong in the given instance and so rendering him unconscious of the punishable character of his act.
19. A person is not immune from punishment for a wrongful act if he has, at the time of perpetrating it, capacity to distinguish between right and wrong in respect thereto,—if he has such capacity and is conscious of the wrongfulness of his conduct.
20. The law does not recognize a form of insanity in which there exists capacity to distinguish between right and wrong and consciousness of the wrongful nature of the particular act, without power to abstain from it; *i. e.* in law he who can distinguish between right and wrong must, at his peril, choose rightly between them.
21. If the court instructs the jury in a criminal case that they should acquit the defendant unless they become satisfied by the evidence beyond every reasonable doubt that he is guilty, that sufficiently informs them that each juror should pass his own judgment on the evidence and not agree with his fellows to a conviction unless he is convinced, with the certainty mentioned, that the accused is guilty.
22. Proof of epilepsy does not, necessarily, directly establish insanity, as epilepsy is not, as a matter of fact or law, insanity, though evidence of an epileptic condition may bear, circumstantially, on the mental condition of the afflicted person to the extent of establishing insanity.
23. Whether the accused, in any given case, was afflicted with epilepsy, and if so whether the affliction was a mental disease or had impaired his mind, and if so whether sufficiently to render him unable to appreciate between right and wrong, are matters of fact to be established by evidence.
24. If one points a loaded gun and discharges it in a direction other than at a person who is in fact killed by the bullet reaching his person, glancing from another object, that one is yet guilty of a homicidal offense, if he knew, or ought reasonably to have known, that his conduct was dangerous to human life and yet he acted regardless thereof.
25. It is not improper to say, according to the facts, in instructing a jury, that experts have given their opinions as to the sanity of

the accused, leaving it to the jury to find the truth of the matter without being necessarily bound by the opinion evidence.

26. After a decision against the accused on a special issue as to insanity, evidence of his mental condition is only admissible on the general issue as bearing on the grade of the offense.

27. It is improper, in the trial of a capital case, to allow communications, verbal or written, between jurors and outside parties, unless strictly necessary and with knowledge of counsel on both sides.

28. Careful isolation of the jury, in a capital case, from all outside influence, so as to avoid any suspicion of the result being characterized by any improper influence, is advised.

29. Prejudice to a complaining party on appeal is not presumed from mere occurrence of error. The error cannot be regarded as harmful, so as to require a reversal unless, within reasonable probabilities, had the error not occurred the result might have been materially more favorable to the one complaining of it.

[Syllabus by Marshall, J.]

Error to review a judgment of the circuit court for Winnebago county: Geo. W. Burnell, Circuit Judge. *Affirmed.*

The plaintiff in error was informed against as having, on the 19th day of May, 1908, at the town of Amberg in Marinette county, Wisconsin, feloniously and with premeditated design, killed one Louis Tobaltz. Such proceedings were duly had that he was placed on trial on a plea of not guilty and a special plea of insanity. A verdict was duly rendered on the special issue in favor of the state. Before there was opportunity to proceed with the trial on the general issue, the circuit judge was constrained to believe it was necessary for him to suspend the trial and discharge the jury because of the serious illness of his wife at the family home in Oshkosh, Winnebago county. Counsel on both sides recognizing that such emergency existed, entered into a stipulation, as follows:

"It is hereby expressly stipulated that the jury now impaneled which has tried the issue of insanity and now is in the custody of the officer shall be discharged from further consideration of the case, that the place of trial and venue of the action be changed from Marinette county to Winnebago county, Wisconsin, the defendant expressly requesting such

change and waiving any irregularity in not proceeding with the issue of not guilty at this time and place, reserving however the right to move the court to set aside the verdict and grant a new trial upon the insanity issue heretofore tried in this county and at this term, that the argument on said matter be taken up before the Hon. GEO. W. BURNELL, the presiding judge, at such time and place as he may direct. Further stipulated that the state may have the privilege of introducing the testimony of such witnesses as given upon the trial of the insanity plea as they may see fit, subject to the objections entered and the objections as to its competency, relevancy, and materiality, that the cause may be placed on the calendar of the present September term of the circuit court of Winnebago county and brought to trial at such term on the 14th day of December, 1908, at 2 p. m. That a jury be summoned upon a special venire for the trial of said cause. And the court to fix a time for hearing the argument on the motion to set aside the verdict rendered on the insanity plea and granting a new trial, which motion is to be heard before the Hon. GEO. W. BURNELL, the presiding judge at this trial at Oshkosh, Winnebago county, Wisconsin, upon notice by the court to both parties, which motion is to be passed upon and argued before the 14th day of December, 1908."

Accordingly the jury were discharged, an order changing the place of trial was entered, and, in due course, the cause was brought on to be heard in Winnebago county. Whereupon counsel for the accused moved the court for an order setting aside the verdict on the special issue and for a new trial thereof, assigning various reasons, all of which related to error claimed to have been committed on the former trial. No point was made, at first, to the effect that the discharge of the jury in Marinette county opened up the special issue for a retrial. All grounds for the motion were upon the theory that the verdict was to be treated the same as if the whole case had been tried in Marinette county and a motion made there for an order vacating the result and granting a new trial because of errors committed on the trial of the special issue. The motion was denied. Thereupon the accused, by his at-

torney, consented to further submit to the jurisdiction of the court only upon condition of the whole case being regarded as open for trial the same as if nothing had occurred in Marinette county regarding the special issue. The court adhered to the opinion that the trial in Marinette county was conclusive as to the special issue, leaving only the general issue of not guilty to be tried on the change of venue, the same as if the trial of such issue had been proceeded with in Marinette county after the verdict on the special issue. Thereafter a plea of former jeopardy was interposed, the claim being that the jeopardy created by the proceedings in Marinette county had not been conclusively waived or superseded; that the consent to discharge the first jury was upon the theory that the one to be impaneled in Winnebago county would take the case where the first jury did, not where it left off; that such was the effect of the written agreement; and that, by the court refusing to so administer it, defendant was entitled to efficiently claim his constitutional right of immunity from being again placed on trial.

The plea of former jeopardy was overruled. Under protest by the accused, that further proceedings were erroneous and illegal because of a former jeopardy, as claimed in the plea, he was, in due form, placed on trial upon the plea of not guilty.

The evidence was to this effect: Prior to the date of the alleged homicide, the accused with his child and a woman purporting to be his wife, resided in the village of Amberg, Marinette county, Wisconsin. He did not live happily with the woman. He was quite jealous of her because, among other things, of her supposed improper relations with Louis Tobaltz. On the evening before the homicide he locked the door of his house against her so she could not gain entrance thereto upon her return after an absence of some less than an hour. The next morning she entered the house through a door left un-

locked by a boarder upon his leaving for his day's duties. A short time thereafter, the accused, taking his rifle and revolver, coerced her to precede him to the working place of Tobaltz. Such place being closed the journey was continued to the place where Tobaltz resided. She then, at the defendant's command, rapped at the door. Thereupon Tobaltz appeared, but upon observing the accused with gun in hand he attempted to retreat into the house, and close the door before him and the accused. At that instant the accused pointed and discharged his rifle in the direction of Tobaltz, whose position was such that the shot passed through the door and struck the latter, severing the main artery of one arm, from the effect of which he died in a short time. As the fatal wound was inflicted, the door swung inward and Tobaltz staggered backward, exclaiming, "I am shot," the accused exclaiming in reply, "Yes, come out here and I will shoot you again." Immediately, or soon, thereafter, he used harsh language toward the woman and expressions indicating that he was in a frame of mind to shoot her. Later he claimed his conduct was caused by improper relations between her and Tobaltz, confessed by her to him on the morning after her aforesaid absence from the house, and preceding his starting out to meet Tobaltz.

On the insanity issue there was much evidence tending to show that the accused was afflicted with epilepsy, the claim being that it, and other derangements, had affected his mind so as to render him irresponsible for the homicide.

The court on the main issue, among other things, informed the jury of the result of the trial of the special issue and that such result settled the question of whether the accused was insane at the time of the shooting, against him, but that evidence of impairment of his mind, not amounting to legal insanity, was to be considered on the question of whether, if the accused was guilty of having committed a criminal homicide,

it was characterized by the element of premeditated design to effect the death of Tobaltz, essential to the full offense charged; that of murder in the first degree.

The trial resulted in a verdict of murder in the second degree and judgment was duly pronounced.

The points saved for consideration on review by this court and so presented as to require consideration, so far as they seem to have sufficient warrant to require special discussion and decision, will be treated in their order.

W. B. Quinlan, attorney, and *Daniel H. Grady,* of counsel, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, A. C. Titus,* assistant attorney general, and *John O. Miller,* of counsel, and oral argument by *Mr. Miller* and *Mr. Titus.*

The following opinion was filed May 24, 1910:

Marshall, J. The constitution (sec. 5, art. I) guaranteed the inviolability of the existing right of trial by jury; that is, that it should continue as before the formation of the constitution. So the fundamental law contemplates a trial of all the issues in a criminal case before an impartial jury of twelve men, selected in the manner provided by law from the vicinage where the crime was committed; that is of the previously ascertained jurisdiction within which the offense occurred. In harmony with that, sec. 7, art. I, of the constitution provides that "in all criminal prosecutions the accused shall enjoy the right to . . . a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law." In harmony with both these constitutional provisions, the statutes regulating the trial of criminal causes where the defense of insanity is interposed, provide for a trial of such issue and the general

issue of not guilty as well before a single jury. Secs. 4679, 4697, Stats. (1898).

That defendant has, as indicated, a constitutional right to have all the issues in his case, including any special issue of fact, particularly as to his sanity, tried before a single common-law jury of twelve impartial men of the county where the crime shall have been committed,—has always been recognized in the jurisprudence of this state. *Gaston v. Babcock*, 6 Wis. 503; *Bennett v. State*, 57 Wis. 69, 14 N. W. 912; *Schissler v. State*, 122 Wis. 365, 99 N. W. 593. It follows that the trial in this case of the special issue in Marinette county before one jury and of the general issue of not guilty in Winnebago county before a second jury, was illegal, as claimed by counsel for the accused, unless he could and did waive his constitutional right to have the whole case submitted to one jury in one county.

The constitution makes no provision for a change of venue in a criminal case, so any such change must be referable to some statute which is in harmony with the guaranteed right, unless such right may be waived. *French v. State*, 93 Wis. 325, 67 N. W. 706. The Statutes, at sec. 4680 (Stats. 1898), provide for a change of venue in specified circumstances upon application of the accused. That contemplates competency to waive the constitutional right by invoking the statutory privilege to a change and has been held valid on the ground of such competency in fact existing. The idea is that the trial must be held in the county where the crime shall have been committed, unless changed upon application of the defendant (*Wheeler v. State*, 24 Wis. 52; *Bennett v. State*, 57 Wis. 69, 75, 14 N. W. 912), and as the right to a change is purely statutory, unless it is invoked upon the terms and in the manner provided by the statute, it does not exist at all. *French v. State, supra.*

It must be observed that the decisions referred to deal,

mainly, with constitutional and statutory rights, so when it is said that the "right to a change of venue depends entirely upon the statute" and "can be had only" as the statute provides, that means can be had only as a matter of right, not that it cannot occur by consent, the accused waiving his right.

As indicated, the very idea of the statute contemplates a constitutional privilege of an accused person to waive his right of trial in the particular county. It must not be lost sight of that the statute respecting a change is valid only on that ground. *Bennett v. State, supra.*

So it follows that it was competent for the accused, in this case, to bind himself by a waiver of the right to a full trial, or any trial, in Marinette county, unless the statutory provisions contemplate a waiver in a particular way and upon particular grounds, excluding all others, creating a disability, if none existed, otherwise, to make a binding waiver upon other grounds and in other ways. It goes without saying that the statute makes no provision for a change of venue in a criminal case for the reason or in the manner the one occurred in this case. Does the constitutional guaranty, or the statute, or both, create a disability in that regard? Those questions are now involved.

The circuit courts of this state are courts, under the constitution, of very extensive jurisdiction. Each is a court for the whole state, restricted, however, somewhat in its activities as to taking jurisdiction *in invitum,* but not by consent. The circuit court for Winnebago county had jurisdiction of such subjects as that involved in this case, and must be held to have had jurisdiction of the subject matter of the particular cause of action, if it came to the court in a permissible way. The question of competency of the accused to waive his right to be tried before a single jury, and his competency to waive his right, as it is claimed he did, to a trial by such jury in Marinette county, may be treated together.

The doctrine of waiver, as applied to a criminal case, is a very broad one—quite as broad as in civil cases. It applies to constitutional as well as statutory rights. *Emery v. State,* 101 Wis. 627, 645, 78 N. W. 745; *Lowe v. State,* 118 Wis. 641, 96 N. W. 417; *Stoddard v. State,* 132 Wis. 520, 112 N. W. 453; *Hack v. State,* 141 Wis. 346, 124 N. W. 493.

An examination of the cited cases will show that no limit has yet been found in this court to the competency of an accused person in a criminal case to waive irregularities or rights, except the single instance, one of disability, in a capital case to waive the right of trial by twelve jurors: *Jennings v. State,* 134 Wis. 307, 114 N. W. 492, following the early case of *State v. Lockwood,* 43 Wis. 403, decided before the doctrine of waiver had attained the recognition which it has in recent years. In the judgment of the writer, the exception mentioned would not be made now if the court were permitted to treat the matter from an original standpoint. In *Okershauser v. State,* 136 Wis. 111, 116 N. W. 769, it was said that the rule of *State v. Lockwood, supra,* should not be extended, and that was emphatically affirmed in *Hack v. State, supra.* The saying in *Emery v. State, supra,* that the trend is in favor of the doctrine that a party in a criminal case may waive irregularities and even rights very much the same as in a civil case, *Judicia posteriora sunt in lege fortiora,* has been many times significantly illustrated in recent years. Constitutional rights have been held waivable in common with mere irregularities. The instances are very numerous. The cases cited are a few of the many.

In *Bennett v. State,* 57 Wis. 69, 14 N. W. 912, it was held that a party in a criminal case, irrespective of any statutory authorization, and in addition thereto, may waive constitutional rights. In *In re Staff,* 63 Wis. 285, 23 N. W. 587, it was remarked that any right secured by sec. 7, art. I, of the constitution to an accused person may be waived by him

without authority of statute, as has often been judicially determined, except the right of a trial by jury. Many illustrations are given of sustained waivers of constitutional rights, among them waiver of the right to a trial in the county of the alleged offense and consent to a trial in a county hundreds of miles distant therefrom. Some regret seems to be there expressed because the court was not untrammeled, as was the court in Iowa, to recognize that competency to waive extended even to a jury trial, the court saying that, even in such field, the right is not so sacred but that it may be waived by legislative consent, thus holding that the question of whether an accused person, in such field, may be bound by waiver, is a matter of public policy rather than constitutional disability.

So it seems to follow, logically, that it was competent for the plaintiff in error to waive his right to a full trial in Marinette county and his right to a trial before a single jury as well; to waive all things done, out of the ordinary, resulting in his conviction, which it is claimed affected fatally such conviction. Whether the waivers occurred or not depends upon the meaning of the stipulation. There is no controversy but that the accused waived any further proceedings before the first jury after the verdict was rendered on the special issue, and waived any further trial in Marinette county, and all objections to the case being taken up for such further proceedings as might be necessary to conclude it in Winnebago county. Did he do so with the understanding that such further proceedings would, necessarily, include a retrial of the special issue before the second jury, or only in case of the verdict on the special issue, on motion made in Winnebago county, being set aside for error?

Looking solely to the stipulation for the change of venue, in connection with what was done under it, it seems that the understanding of all the parties, when they signed the agreement, was that the trial in Winnebago county would be taken

up before a second jury in the condition in which it was left when the verdict of the first jury on the special issue was recorded. The meaning of this language seems quite clear:

"The jury now impaneled which has tried the issue of insanity . . . shall be discharged" and "the place of trial and venue of the action shall be changed from Marinette county to Winnebago county, Wisconsin, the defendant expressly requesting such change and waiving any irregularity in *not proceeding with the issue of not guilty at this time and place, reserving however the right to move the court to set aside the verdict and grant a new trial upon the insanity issue. . . .*"

Other language as plainly suggested a new trial of the whole case only upon the verdict on the insanity issue being set aside for cause. Do not the words "in not proceeding with the issue of not guilty at this time and place" by necessary inference suggest that the next thing to be done in the case was the trial of that issue, subject to the reserved right to challenge in Winnebago county, for cause, the validity of the verdict rendered on the special issue, the same as it might have been in Marinette county before the stipulation was made? It seems so to us. Moreover, we should feel sure that the learned counsel for plaintiff in error so understood the stipulation, when the case was brought on for a hearing in Winnebago county, in the absence of his protest that he did not. No claim was at first made that the partial trial in Marinette county was superseded by the stipulation and what had occurred under it, so as to open up the case for trial in the whole. An ordinary motion was made, as might have been done in Marinette county before the jury there were discharged, for an order vacating the verdict for error. That motion treated the verdict already rendered, binding, so far as it went, unless the court should set it aside for some ground of error suggested.

Again, when the plea of former jeopardy was interposed, consent was incorporated therein to stand by the stipulation.

There, for the first time, so far as the record shows, it appears that a claim was made that the stipulation secured to the accused a new trial of the special issue, regardless of whether fatal error was committed upon the first trial. The language does not suggest that the result of the first trial was necessarily superseded by the mere circumstance of the suspension of the proceedings till again taken up before another jury in another county. It suggests that there was a stipulation, not for leave to move for a new trial of the special issue, or merely reserving the right to so move, but for a new trial of such issue, and the court had lost jurisdiction by denying it, rendering the accused competent to plead the former partial trial as a jeopardy not waived, and so precluding a second jeopardy. The idea expressed in the plea, "the defendant now offers to submit to a trial of said special insanity plea under and pursuant to the stipulation," the trial court was unable to discover was in the stipulation, in letter or spirit, and we are likewise unable. The plea did not attempt to withdraw from the stipulation. It merely claimed for it, seemingly as a last resort, a meaning not found to be therein by the court nor by this court. If the learned counsel intended to incorporate such meaning in the paper, the words chosen to express it were most unfortunately selected.

It follows that the right of trial before a single jury of and in Marinette county, was not only effectually waived by the accused, but the jeopardy created by the partial trial in such county was waived by the consent to discharge of the first jury and conclusion of the trial before another jury in another county.

It is elementary that if, though an accused person once enters jeopardy, he consents, expressly or by necessary inference, to its being superseded, he may again be placed in jeopardy without any violation of his constitutional protection against being so placed twice. Moreover, it is quite elementary that after jeopardy has been entered it is subject to

necessary suspension without a formal verdict where the ends of justice, under the circumstances, would otherwise be defeated if it was not competent to suspend the trial, discharge the jury, and later impanel a second jury. *State v. Crane,* 4 Wis. 400; *Benedict v. State,* 14 Wis. 423; *Thompson v. U. S.* 155 U. S. 271, 15 Sup. Ct. 73. In the federal case the court held:

"Courts of justice are invested with authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy. . . ."

Under the foregoing it is considered that upon the emergency occurring, which in the judgment of the trial court and counsel upon both sides rendered further proceeding with the case for a considerable period of time practically impossible, it was within the competency of the court to supersede the jeopardy existing and discharge the jury, and certainly within such competency, the accused consenting. So there was no former jeopardy existing when the trial was called in Winnebago county, interfering with the trial of the issue of not guilty before the second jury. The accused was a party to the agreement creating the conditions rendering it competent for the court to proceed with such trial. He was competent to bind himself to submit to the trial as it was had by signing the stipulation after rendition of the verdict on the special issue. He could not without permission of the court have withdrawn from such stipulation. He made no attempt to withdraw therefrom, but only claimed therefor a different meaning than seems to have been incorporated therein.

We are unable to agree with counsel for plaintiff in error that the evidence established insanity as a matter of law. We are rather constrained to believe that the jury were well war-

ranted in reaching the conclusion that there was no reasonable doubt but that the accused was sane, in the legal sense, at the time of the homicide. Therefore, the court properly refused to direct a verdict in favor of the accused on the special issue.

We are unable to discover any prejudicial ruling on objections to questions propounded to experts who testified upon the special issue. It is suggested that the trial court ruled on such objections upon the theory that it was competent for a party calling an expert to propound to him and have answered hypothetical questions, omitting or including at pleasure matters covered by the evidence, leaving the weight of responses to abide the judgment of the jury under all the circumstances. Counsel gathered that idea because of the court having remarked in overruling an objection, "The counsel has framed his own hypothesis; he is not obliged to take the hypothesis of the other, and if there are any assumptions in the question which are not proven by the evidence, why to that extent it destroys the value of the answer." True, the counsel calling an expert has a right to frame his own hypothesis, but just as true it should be one reasonably covering an entire supposed situation according to the evidence. It should include, from a reasonable viewpoint, all elements disclosed by the evidence bearing on the precise point to which the expert's attention is directed. But the viewpoint is that of the interrogator, not of the adversary attorney. True, as the court said, whether the facts assumed for the purposes of the question are true in fact, is for the jury to determine, and in case of a determination adverse to the questioner, to that extent it destroys the value of the answer. Really, we are unable to see the meaning in the court's language which counsel attributes to it. Rightly understood, we do not see any difficulty with it. It means that the questioner had a right to state to the witness a hypothesis, reasonable from his viewpoint, subject to the judgment of the court, on the question of competency, as to whether it was reasonable from such point though it might ap-

pear not so from an adversary situation. It must be assumed, from aught appearing in the record, that, in testing questions objected to for competency, the court considered them with reference to whether they were justified by all the evidence and included, in a reasonable view of the case, all elements bearing on the precise subject of inquiry. That is all the rules require as this court has held. *Schissler v. State,* 122 Wis. 365, 373, 99 N. W. 593. In such field a trial judge has much latitude. The decision cannot properly be disturbed unless it is manifestly wrong and also prejudicial to the extent that if the error had not been committed the result of the trial might, within reasonable probabilities, have been different. This doctrine, as to rulings of trial courts on mere questions of competency, follows from the general rule that determinations of such courts on matters of fact are to be taken as verities unless manifestly wrong, and the rule of the Code that errors however numerous shall be regarded as inconsequential, unless it appears that they were in fact prejudicial, in that they may reasonably have led to a materially different result than otherwise would have occurred. These general observations sufficiently answer the assignments of error as to questions propounded to experts on either side. They have been examined in detail without discovering prejudicial error within the rules stated.

The reputed wife of the accused was called as a witness, and to show her competency the record of a divorce action in a court of competent jurisdiction, and authenticated so as to be admissible as evidence under ordinary circumstances, was offered and received for the purpose of showing that the purported marriage of the witness with the accused was within one year after he was divorced from a former wife and so was illegal under *Lanham v. Lanham,* 136 Wis. 360, 117 N. W. 787. It must be conceded that if the marriage occurred as suggested, it was invalid, but it is claimed that it was not competent to prove the record by certification, in that such

method violated the constitutional right of the accused to meet the witnesses face to face.

The witness sworn was the only one whose competency was legitimately in question. That witness defendant met face to face. The person upon whose act the requisite character of the certified copy depended, was not a witness against the accused in the constitutional sense. At most, he was a witness on the question of the competency of the purported wife to be a witness in the case. The question is rather new, but, logically, it seems that the constitutional right does not extend so far as to preclude the use of duly authenticated copies of public records on a criminal trial for the mere purpose of establishing, on the issue before the court of competency, the right of a witness to testify.

To meet the evidence as to the competency of Mrs. Oborn, so called, to testify, counsel for the accused offered in evidence the original record of a divorce action wherein, subsequent to the time of the purported marriage, she was divorced from him. Counsel contended that the judicial treatment of the relations between the parties at the time of such divorce judgment, as those of husband and wife, in effect, judicially established such to be their status, till changed by such judgment. The record, as the court remarked, negatived the fact that the parties entered into a marriage contract subsequent to the void marriage, because such void marriage was the one, according to the finding, the action was brought, and the judgment purported, to dissolve. It seems that the mere treatment of the parties as man and wife in the divorce action, and judicial dissolution of their purported relations, did not make the void marriage valid. It merely established the status of the parties toward each other as judicially separated and absolved from all obligations of a marital nature existing between them. The action was not to establish the status of the parties to be that of man and wife. Had that been the purpose of the action it would have been binding generally.

The action and the result, dissolving any existing marital relations between the parties, did not, as to the public generally, establish such relations to be such as the parties claimed for them. So far as the action was *in rem* the *res* was the condition of subsequent singleness as to each other, not valid prior existence of marital relations.

So it seems that upon all the evidence before the court on the question of competency, the witness never in fact became the wife of the accused and so was competent to testify when she was called for that purpose.

Complaint is made because the court excluded evidence of the appearance of the accused some time after the homicide and while he was confined in jail, during a period when he was afflicted, as said, with an epileptic disturbance. There is no doubt but that actions of a person, within reasonable limitations, after a homicide committed by him, as well as before, may be competent on the question of sanity. This court has distinctly so held. *French v. State,* 93 Wis. 325, 338, 67 N. W. 706. But as there said, evidence of such subsequent conduct is not necessarily admissible. Whether it is so, is within the field of competency, where, as before indicated, a wide range of judgment is permitted and error of judgment is regarded as inconsequential, unless it appears that it may probably have materially affected the result. In such a situation as that presented to the court here, the remoteness of time, the situation and surroundings, and many other things bearing on whether the incidents inquired about had such relation to the defendant's condition of mind at the time of the homicide, or such relation as to render the evidence of any real substantial probative force in any reasonable view of the case, all had to be considered. Such a matter, as said in *French v. State, supra,* is addressed "in the first instance, to the sound discretion of the trial court."

From the foregoing it is obvious that it must be, not only a case of plain error, but prejudicial error, not prejudicial in

the ancient sense of legal presumption of prejudice from the mere commission of error, but prejudicial as a fair inference of fact, to justify a court, upon review, in condemning a mistake in respect to rulings on the admission of evidence of acts of a person after the fact bearing on his mental condition at the time thereof, or even finding that mistake of any sort was made. The alleged error in question falls well outside of that field.

The court was requested, on behalf of the accused, to instruct the jury to the effect that though the accused at the time of the homicide had sufficient mental capacity to enable him to know and appreciate the wrong of his act, yet he was legally insane, if by impaired will power, resulting from an abnormal condition, he was unable to resist the impulse to do the deed. That was refused. It was, as claimed, good law according to some authorities, particularly *Plake v. State,* 121 Ind. 433, 23 N. E. 273. It is condemned, however, by numerous decisions in this state, notably *State v. Wilner,* 40 Wis. 304; *Bennett v. State,* 57 Wis. 69, 14 N. W. 912; *Butler v. State,* 102 Wis. 364, 366, 78 N. W. 590; *Eckert v. State,* 114 Wis. 160, 163, 89 N. W. 826; *Lowe v. State,* 118 Wis. 641, 660, 96 N. W. 417; *Schissler v. State,* 122 Wis. 365, 99 N. W. 593, though it must be admitted that in one of them, at least, language was used approving some such idea as at least not harmful error because of its liberality to the accused. The test declared in those cases is the well-known knowledge of right and wrong test.

The term "insanity," as used in the special plea in a criminal case, means such abnormal mental condition, from any cause, as to render the accused at the time of committing the alleged criminal act, incapable of distinguishing between right and wrong and so unconscious at the time of the nature of the act which he is committing, and that commission of it will subject him to punishment.

True, as indicated, there are things in some of the cases

liable to lead to the belief that legal insanity may exist if, though the person be fully conscious of the wrong and its punishable character, he, because of a perverted mind, is moved by an uncontrollable impulse. For instance, such theory was incorporated into the charge in *Butler v. State, supra,* in connection with and as an addition to the statement that legal insanity means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong. That was approved, really, as not prejudicial, since it was the doctrine most favorable to the accused and one announced in a famous case referred to. We will say, however, that the instruction given in such case does not possess the dignity of having been approved by ultimate authority. Whether a refusal to give the element so said to be most favorable to the accused would have been regarded as fatal error, was not stated.

In *Lowe v. State, supra,* the giving of such so-called most favorable rule was held not error, to the prejudice of the accused, upon authority of *Butler v. State, supra; Eckert v. State, supra,* being also referred to. In that case complaint was made because the trial court in the charge preserved throughout, as the dominating feature, the idea that "if the defendant, at the time of the homicide, had sufficient mind to know right from wrong and understand the nature and quality of the act he was committing, then that he was sane in the law," and that was unqualifiedly approved as a correct statement of the law. True, it was said to be "fully justified by and that it in fact closely followed what was said in *Butler v. State.*" Consistency requires us to hold that it follows what was stated to be the rule rather than the most liberal rule. Whether the former or the latter was technically the correct rule, was not stated in *Butler v. State.*

That there is a wide distinction between the two rules seems plain. The so-called most liberal rule recognizes existence of

legal insanity notwithstanding capability to distinguish between right and wrong and consciousness of the wrongfulness of the particular act. The other does not. This court in *Eckert v. State, supra,* clearly reaffirmed the latter to be the correct rule. That is unmistakable because the court referred to the language of Chief Justice Shaw in *Comm. v. Rogers,* 7 Met. 500, as having become the reliable classic on the subject and incorporated into the text-books so as to be recognized, generally, as elementary. The following is the language:

"A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing,—a knowledge and consciousness that the act he is doing is wrong and criminal and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment,—such partial insanity is not enough to exempt him from responsibility for criminal acts."

Consistent with that view, in the more recent case of *Schissler v. State,* 122 Wis. 365, 99 N. W. 593, it was held that the trial court did not unduly restrict the test of insanity by impressing upon the jury the idea that the accused was legally sane at the time he did the act if he was then capable of realizing the nature and quality of the act, or that the act was wrong. The following instructions were approved as the correct statement of the law:

"The term 'insanity' as used in the special plea and issue of insanity made by the defendant, means such perverted con-

dition of the mental and moral faculties as to render the person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing."

"If you find from the evidence that at the time of the alleged commission of the offense the defendant was suffering from mental aberration or sickness of mind produced by any cause, and by reason thereof his judgment, memory, and reason were so perverted that he did not realize the nature and quality of the act he was doing, or that he did not realize that it was wrong, you must find that he was insane, and for that reason not guilty."

It is not without interest in the historical review of the subject under discussion, that in neither of the later cases were the earlier ones of *State v. Wilner* (40 Wis. 304), decided in 1876, and *Bennett v. State* (57 Wis. 69, 14 N. W. 912), decided in 1883, referred to. In both the consciousness of right and wrong test was regarded as the correct one. In the latter case, except for other language in the charge considered, covering an additional unwarranted element, this was approved:

"If the evidence satisfies you that, at the time when he killed Dr. Hogle, the defendant was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; . . . then you should find that he was insane."

That definite declaration of the correct rule is somewhat involved by a brief quotation, in discussing language condemned, from *Ortwein v. Comm.* 76 Pa. St. 414, 421. The quotation, it should be remembered, was from that portion of the charge of the trial court respecting whether the accused was sufficiently sane to commit murder in the first degree, not whether he was wholly irresponsible. The court said that one's criminal responsibility exists, to some extent, so long as his perception between right and wrong exists.

Thus it will be seen that one should not be misled into the belief, from the approval in *Butler v. State, supra* (102 Wis. 364, 78 N. W. 590), of a stated test of insanity as being a cor-

rect formulation of the most liberal rule, and that the giving of it cannot be efficiently complained of by an accused person, that such most liberal rule is the correct rule, or that it ought to be given in any case, or that the rule, eliminating the element which would dignify it as the most liberal, is not the correct one in fact. This court is not committed to the doctrine that one can successfully claim immunity from punishment for his wrongful act, consciously committed with consciousness of its wrongful character, upon the ground that, through an abnormal mental condition, he did the act under an uncontrollable impulse rendering him legally insane. One, at his peril of punishment, commits an act while capable of distinguishing between right and wrong, and conscious of the nature of his act. He is legally bound, in such circumstances, to exercise such self-control as to preclude his escaping altogether from the consequences of his act on the plea of insanity, though his condition may affect the grade of the offense. Thus far the charity of the law goes and no farther. As said in *Flanagan v. People,* 52 N. Y. 467, as epitomized in the syllabus:

"The law does not recognize a form of insanity in which the capacity of distinguishing right from wrong exists without the power of choosing between them."

Many foreign judicial illustrations might be given supporting the foregoing stated doctrine of this court. It is in harmony with the common law as indicated by a multitude of English decisions and all text-books. It is denominated, for brevity, by some of the latter as the "right and wrong test." In *Bellingham's Case,* reported in Collinson on Lunacy, 650, Lord Mansfield charged the jury that "the single question for them to determine was whether [the accused] when he committed the offense charged upon him he had sufficient understanding to distinguish between good from evil, right from wrong; and that murder was a crime, not only against the law of God, but against the law of his country."

That test of power to distinguish between right and wrong, so formulated by Lord MANSFIELD, is in substantial harmony with English authorities as far back as 1706, at least, and is said to have ever since been followed in England "as the only one to mark the line between sanity and insanity, responsibility and irresponsibility." Lawson, Insanity as a Defense to Crime, 552.

In *M'Naghten's Case,* 10 Cl. & F. 200, which is a leading English authority at the present day, it was held that if the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to law he was punishable, he was legally sane. Lawson, Insanity as a Defense to Crime, 231. That has been adopted in the great majority of state and federal courts, while moral insanity, or irresistible impulse accompanied by consciousness of right and wrong doing, as legal insanity, has been recognized in but a very few jurisdictions, and in some of them not consistently. Those ideas are spoken of, rightly, as dangerous and as having taken hold most firmly in Kentucky.

In *U. S. v. Shults,* 6 McLean, 121, Fed. Cas. No. 16,286, the law was very tersely stated thus:

"If . . . defendant in violating the mail knew he was doing wrong and that he was liable to punishment for the act, he is a proper subject for punishment."

With like commendable brevity, it is said in *U. S. v. Young,* 25 Fed. 710, for a syllabus:

"The legal test of the accountability of a criminal for his acts is his mental ability, at the time of the commission of the crime, to discriminate between right and wrong, with respect to the offense charged."

That was referred to in the opinion as the "famous 'knowledge of right and wrong test' adopted by the court after long discussion and formulated by the House of Lords in 1843." *M'Naghten's Case,* before referred to.

In New York the same doctrine was adopted (*Willis v. People*, 32 N. Y. 715), though there were many attempts to engraft onto it modifications in accordance with the views of medical experts. In *Freeman v. People*, 4 Denio, 9, and *Flanagan v. People*, 52 N. Y. 467, a like effort was made. It was answered by reaffirming the doctrine announced by Tindal, C. J., in *M'Naghten's Case*, 10 Cl. & F. 200, as of the highest authority and the sound rule. Contrary medical and scientific authority was emphatically rejected. The matter was regarded of sufficient importance to warrant special treatment by Justice Andrews, resulting in its being held that "capacity of the defendant to distinguish between right and wrong at the time the act was done" was the only safe test; that he who is capable of knowing one from the other is bound, in law, to choose the right one regardless of the notions of some as to moral insanity or irresistible impulse. It was said that "the vagueness and uncertainty of the inquiry which would be opened and the manifest danger of introducing the limitations claimed into the rule of responsibility, in cases of crime may well cause courts to pause before assenting to it."

Notwithstanding the emphatic adoption by the New York court of the capacity to distinguish between right and wrong test, as indicated, the pressure by eminent alienists to engraft onto it the irresistible impulse element, and others, was such that the legislature, evidently intending to guard the jurisprudence of the state from falling into confusion, or the safe rule from being departed from to the impairment of the safety of human life, incorporated it into written law. *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275. The court there said that the eminent alienists who were disposed to criticise the rule and claim that a person should be held legally insane when by reason of an abnormal mental condition he acts under an irresistible impulse, should address themselves to the lawmaking power; that as the matter stood, knowledge of the nature

and quality of the act that a person is doing and that it is wrong, renders him legally sane. We should say, in passing, that the written law remains the same in New York as it was at the time of such suggestion in 1893.

This lengthy discussion of the subject of legal insanity seems warranted because of the evident misconception of what was held in *Butler v. State, supra.* We should further say in passing that the learned court, though having refused the requested instruction, gave others requested, going nearly as far as the one rejected and more liberal to the accused than the right rule demanded.

The court refused to specially instruct, as requested, that each juror should adhere to his own individual judgment from the evidence as to the defendant's insanity and not join with others in finding him sane so long as he entertained an honest reasonable doubt on the question. It is, said this court in *Franklin v. State,* 92 Wis. 269, 66 N. W. 107, regarding refusal to give a similar instruction,—error. Such does not seem to be the case. The difficulty there was in failure to charge on the legal presumption of innocence, not because the court, in addition to such a charge, did not admonish the jury that before finding the existence of a fact, each should come to the conclusion in that regard from his own judgment based on the evidence. When jurors are instructed properly they need not, necessarily, be told that they should not agree upon a verdict, unless individually convinced from the evidence of its correctness to the requisite degree of certainty. A person who has sufficient intelligence to sit on a jury knows, from the proper general instructions, that he should act according to his own judgment based on the evidence.

The claim made that it was error to refuse to instruct to the effect that as a matter of law epilepsy is a mental disease and that grief, agony, or terror is one of the producing causes of epileptic attacks, under the ruling of *Kreuziger v. C. & N.*

W. R. Co. 73 Wis. 158, 160, 40 N. W. 657, and some other cases cited, does not seem to possess merit. It is argued that proof of epilepsy is proof of insanity and that the authorities so hold. As we read the citations, such is not the case. They are to the effect that a person may be an epileptic and be perfectly responsible for his actions, except when suffering from an epileptic disturbance, called a fit; that epilepsy may cause insanity, but does not constitute it, and the two should not be confounded. *Aurentz v. Anderson,* 3 Pittsb. Rep. 310. That a person afflicted with insanity may yet have capacity to distinguish between right and wrong, and if so he is legally sane. *Fogarty v. State,* 80 Ga. 450, 5 S. E. 782. That it is not sufficient to establish irresponsibility to show epileptic affliction, but it must be shown by evidence as a fact that epilepsy is a disease which affects the mind or produces insanity, and that there was legal insanity in the given instance. *Walsh v. People,* 88 N. Y. 458.

Thus, whether the accused was afflicted with epilepsy, and if so whether it was a mental disease, or whether it had progressed so far as to affect the mind, and if so whether the mind was so affected that the accused was not conscious of the wrongful character of his act at the time of the homicide, were all matters of fact to be established by the evidence.

Complaint is made because the court refused to instruct the jury to the effect that if the accused intentionally pointed the gun at some other object than the deceased and the bullet was accidentally deflected, striking the deceased with fatal effect, he was not guilty. The court gave the requested instruction by adding the words "of murder in the first degree." The instruction might well have been refused altogether because of its not being warranted by any evidence in the case. As we understand the evidence, the bullet went straight to the person of the deceased; passing through the door, it is true, because of that being suddenly partly closed between the person of the deceased and the accused as the former saw the lat-

ter raise his gun. But if there were evidence that the gun was not pointed at the deceased, but yet was handled so as to be imminently dangerous to him or some other human being and regardless thereof, though without design to effect the death of any one, the accused was, nevertheless, guilty of some homicidal offense.

It is suggested that the court, by way of recital, said to the jury that experts on both sides had given opinions as to the sanity of accused at the time of the homicide, and also instructed so as to limit the effect of evidence, on the general issue, of defendant's mental condition, to murder in the first degree. It was not improper to speak of the obvious fact that the experts had expressed opinions on the question of sanity, leaving it to the jury to find whether, as matter of fact, the accused, at the time of the homicide, was sane or there was a reasonable doubt on the subject, the court suggesting, as was done, that the jury were not bound by the opinion evidence; that it was for them to decide from all the evidence, under the test given for legal insanity, whether the accused was sane at the time of the homicide, and if they believed he was not, or were in reasonable doubt on the question, to find him not guilty on that ground. The instructions as to evidence of mental impairment expressly informed the jury that it bore on whether there was design to take human life, and informed them, fairly, that it bore on whether the accused was conscious of his act being dangerous to human life. That, it seems, was sufficient.

During the trial of the special issue, unknown to the accused or his counsel till after trial of the main issue, letters addressed to a juror, or jurors, after having been examined by the judge and any reference to the case eliminated, were allowed to be delivered. The judge explained the occurrences as pursuant to an announcement made in open court after the jury were sworn, to the effect that written communications might pass between jurors and their families, subject to in-

spection by the court in all instances to guard against anything improper so reaching them from the outside or the outside from them, and that no objection was made by counsel upon either side. No evidence of such announcement having been made appeared upon the clerk's or the reporter's minutes, neither did counsel on either side have any recollection of it.

Further irregularities in respect to the conduct of the jurors is suggested in that, as claimed, two jurors, during the trial, while standing at the open window of their room talked with two persons outside. There was much proof to the effect that no such conversation occurred, except that a person from the street on the occasion of the claimed conversation, asked his father, who was on the jury, for some keys which, without saying anything, he passed out to the son.

The circuit judge explained that all written communications between jurors and outside parties, four or six in number, were between jurors and members of their families and that none were delivered during the trial which contained any reference to the case. The suggested irregularities with the jury were brought to the attention of the trial court as ground for a new trial.

Thus it will be seen that not only is there no showing that the accused was prejudiced by the occurrence complained of, but prejudice is pretty clearly negatived. Courts should be slow to disturb verdicts upon the ground of alleged misconduct of jurors or interference with their deliberations. The motive to cast suspicion upon the result of a trial is so great, and the opportunity to do it so open and so easily embraced, especially in a case of great public interest, that, in most any such case, many little incidents actually occurring of a perfectly legitimate character may be easily given a false coloring, and other incidents, not legitimate, may be brought to the attention of the court without any reasonable ground for an inference of fact as to their having affected the result, and

still other incidents may easily be falsely claimed to have occurred, so that unless such matters are held not to be sufficient to disturb the course of justice, in the absence of clear indications, and by preponderating inferences of fact, that they, within reasonable probability, at least, materially affected the result adversely to the complaining party,—the administration of justice would be intolerably embarrassed to the great detriment of public and private interests. Doubtless the constructors of the Code by sec. 2829, Stats. (1898), designed that such should be the guiding idea of judicial practice in this state when they there provided, in mandatory language, that:

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

That has been referred to as a most beneficent provision, precluding disturbance of judicial results by any inconsequential matter, and that, in the spirit of it, all irregularities and errors should be deemed inconsequential, in the absence of reasonably clear indications that the adverse party was prejudiced thereby, in that, otherwise, the result, as to him, might, within reasonable probabilities, have been different. Under the guide of that statute judgments have been affirmed though grounded on records bristling with error, of which the following are significant illustrations: *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816; *Miller v. State*, 139 Wis. 57, 94, 119 N. W. 850.

Such is believed to have been the general trend of the decisions of this court, though it must be admitted that it is not in harmony with expressions made now and then to the effect that from the mere occurrence of error prejudice is presumed. Doubtless, it was in great measure, because of such occasional expressions that the legislature, very recently, thought, by

ch. 192, Laws of 1909, to challenge judicial attention anew to the declared public policy of the state in its written law, in providing that, no judgment in either a civil or criminal case shall be disturbed except for error which, in view of the whole situation, in the judgment of the court, affected the substantial rights of the party seeking to have it disturbed. That, in the judgment of the writer, is no more than emphasizing what was covered by the early Code provision and has been, in general, intended by the court to be firmly and fully carried out. As such, it is welcomed by those who firmly believe it was unnecessary and does not really change the procedure in this state. At least, it aids in unifying judicial sentiment, if that were necessary, as to the proper method of administering justice in order to render right results as certain, speedy, and economical as practicable, and in eliminating seeming or actual departures therefrom in the past, as evidenced by *Hack v. State,* 141 Wis. 346, 124 N. W. 492.

Of course, the legislature did not intend to, and could not if it would, control the court in the administration of justice by the act of 1909. It was only intended to declare a public policy as to such administration which it is the duty, as well as the pleasure, of the court to conform to, so far as it reasonably promotes, or does not unreasonably interfere with, the exercise of their constitutional jurisdiction.

There is no longer, if there ever was, any reason for holding that a judgment should be reversed for mere errors, however numerous and inexcusable, or errors in the absence of its reasonably appearing as an inference of fact that the party seeking reversal was prejudiced thereby, in that had the error not occurred the result, as to him, might, within reasonable probabilities, have been more favorable. That must be the true test of prejudicial error, displacing, if necessary, the idea that prejudice is to be presumed from the mere occurrence of error and giving controlling dignity to the idea that prejudicial error is presumed against, this presumption to prevail

till overcome, to the extent above indicated, by preponderating inferences of fact. To go further than suggested would probably invade the constitutional right to have the weight of probabilities respecting matters of fact determined by a jury or the trial judge according to circumstances.

In view of the foregoing it is thought that the claimed misconduct of the jury must be held to have been inconsequential. That is in harmony with the ruling in *Cupps v. State,* 120 Wis. 504, 97 N. W. 210, 98 N. W. 546. It is claimed to be out of harmony with *Havenor v. State,* 125 Wis. 444, 104 N. W. 116; *Hurst v. Webster Mfg. Co.* 128 Wis. 342, 107 N. W. 666; *Du Cate v. Brighton,* 133 Wis. 628, 114 N. W. 103; and *Dralle v. Reedsburg,* 135 Wis. 293, 299, 115 N. W. 819, all decided, as will be seen, before the recent legislative expression of public policy. In any event, they are in a class by themselves. They deal only with private communications between the trial judge and the jury. Doubtless, the rule thereof should not be extended in letter or spirit. No more need be said at this time.

We may well say, in closing, that notwithstanding the practice of allowing written communications to pass between jurors and outside parties in such a serious case as this, or any, under the circumstances shown here, is held to be harmless error, it must be condemned as improper. The fact that many irregularities may occur in the progress of a trial without affecting the result, should not lead to any laxity in judicial procedure and will not be regarded as any excuse for it. In capital cases, especially, the greatest care should be taken by trial judges to so administer affairs as to leave the final result free from any suspicion of improper influence. To that end the jury from the time of being sworn in the cause till deliverance of their verdict may well be kept as free as practicable from all, even appearances of, opportunity for communicating with outside parties, or receiving communications from them.

Thus we have reviewed the record of the two trials in this cause, giving careful attention to the complaints in quite minute detail without finding any harmful error, and very little error at all. On the whole, the cause seems to have been very fairly tried and the accused found guilty in due course. So the judgment must be affirmed.

By the Court.—So ordered.

A motion for a rehearing was denied October 4, 1910.

IN RE PETITION OF PIERCE-ARROW MOTOR CAR COMPANY.
IN RE PETITION OF CHALMERS-DETROIT MOTOR CAR CO.
IN RE PETITION OF LOCOMOBILE COMPANY OF AMERICA.
IN RE PETITION OF POPE MANUFACTURING COMPANY.

September 13—October 4, 1910.

Supreme court: Superintending control: Jurisdiction, when exercised: Writ of prohibition: Foreign corporations: Service of summons on agent: Contract of sale or of agency? Conspiracy: Where cause of action arises: Appeal.

1. The jurisdiction of the supreme court in respect to its superintending control over inferior courts is not to be exercised upon light occasion, but only upon some grave exigency; the writs by which it is exercised will not be used to perform the ordinary functions of an appeal or writ of error; the duty of the court below must be plain and the actual or threatened violation thereof clear; the results must not only be prejudicial but must involve extraordinary hardship; the remedy by appeal or writ of error must be utterly inadequate; and the application for the exercise of the power of superintending control must be speedy and prompt.
2. In order that the duty of the court may be plain within the foregoing rule, the situation must be such that hardly more than a statement of the facts is necessary to convince the legal mind as to what that duty is. Where questions of law or fact are involved of such difficulty that a judge may reasonably, proceed-

ing considerately, commit judicial error, the power of superintending control will not be exercised, but the parties will be left to their remedy by appeal.

3. Where an application to vacate the service of process upon a foreign corporation, in an action where the cause of action arises within this state, involves the consideration of a long written contract between the corporation and the person upon whom service is made, relating to sales to and by the latter, from which it appears that, although the term "agent" is not used, it is a serious question whether an agency in fact is not thereby created, it cannot be said that the duty of the court to set aside the service is plain, within the meaning of the rule above stated.

4. In such a case the facts that an order denying the application is not appealable and that to obtain a review of the question on appeal defendant must permit the entry of a judgment by default against it for heavy damages, do not make a case of such exceptional hardship that the supreme court should intervene in the exercise of its power of superintending control. TIMLIN, SIEBECKER, and KERWIN, JJ., dissenting, are of the opinion that refusal to exercise the supervisory power in such a case amounts to a denial of due process of law.

5. Where a complaint by one foreign corporation against other foreign corporations for a conspiracy to ruin its business, charges one of the principal overt acts of the conspiracy, from which great damage is alleged to have resulted, to have been committed within this state, a substantial part at least of the cause of action arises within this state and, under subd. 15, sec. 2637, Stats. (1898), the summons may be served upon any agent of a defendant corporation having charge of or conducting any business for it in the state. TIMLIN, SIEBECKER, and KERWIN, JJ., dissenting, are of the opinion that, the gist of an action for conspiracy being not the combination but the damage done, the plaintiff corporation is damaged, if at all, where it exists and has its property, business, and good will.

6. Whether or not an agency was in fact created by a contract between a foreign automobile company and an individual or corporation within this state, which does not in terms designate the latter as agent, but provides for the sale to him or it of a certain number of automobiles at specified prices, prescribes certain territory within which such party shall have the exclusive right of sale, and contains other stipulations in regard to credits on repairs ordered, the supply of advertising matter, diligence on the part of the dealer in furthering sales, non-contest of patents, etc., so that service upon such dealer would bind

the foreign corporation, not decided. TIMLIN, SIEBECKER, and KERWIN, JJ., in dissenting opinion, take the view that such a contract is one of sale and not of agency.

7. An order denying an application to vacate the service of a summons on a foreign corporation on the ground that the person served was not an agent upon whom service was authorized, is not appealable, nor is it reviewable upon appeal from the final judgment if the defendant appears and defends upon the merits.

APPLICATIONS for writs of prohibition to restrain the further prosecution of an action in the circuit court for Milwaukee county, on the ground that the summons had not been properly served on petitioners. *Petitions denied.*

The facts of the case and the allegations of the petitions are fully set forth in the opinion of the court and the dissenting opinion.

For the petitioners there was a brief by *Quarles, Spence & Quarles,* and oral argument by *T. H. Spence.*

In opposition there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *J. B. Kemper.*

WINSLOW, C. J. These are four separate petitions for writs of prohibition. The petitioners are all foreign manufacturing corporations and were joined as defendants with a large number of other foreign and domestic corporations in an action brought in the circuit court for Milwaukee county by the *Velie Motor Vehicle Company,* a foreign corporation, charging conspiracy to ruin its business and alleging damage to the amount of $500,000. The summons and complaint in said action were attempted to be served on the petitioners by service upon certain persons and domestic corporations alleged to be agents of the respective petitioners transacting business for them in this state. The petitioners separately moved in the circuit court, upon affidavits showing the contract relations between themselves respectively and the alleged agents upon whom service was attempted to be made,

for orders setting aside the service in each case upon the ground that the persons and corporations upon whom service was made were not agents of the petitioners within the meaning of the statute. These motions were denied, and the petitioners now ask this court to exercise its power of superintending control and issue writs of prohibition to the circuit court and its judge, commanding that no further proceedings be taken in that action and that the motions to set aside the attempted service be granted.

The power of "a general superintending control over all inferior courts" which the constitution (art. VII, sec. 3) grants to this court was first extensively considered and its limits defined in the case of *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081. The subject has been discussed in a number of cases since that time, but no attempt has been made either to vary or enlarge the general principles laid down in the first named case, but, on the other hand, in all of the subsequent cases those principles have been either literally or in substance approved and applied.

Those principles in substance are that this jurisdiction is not to be exercised upon light occasion, but only upon some grave exigency; that the writs by which it is exercised will not be used to perform the ordinary functions of an appeal or writ of error; that the duty of the court below must be *plain;* its refusal to proceed within the line of such duty or, on the other hand, its intent to proceed in violation of such duty must be *clear;* the results must be not only prejudicial but must involve extraordinary hardship; the remedy by appeal or writ of error must be utterly inadequate; and the application for the exercise of the power of superintending control must be speedy and prompt. *State ex rel. Fourth Nat. Bank v. Johnson, supra; State ex rel. Milwaukee E. R. & L. Co. v. Circuit Court,* 133 Wis. 442, 113 N. W. 722; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158; *State ex rel. Umbreit v. Helms,* 136 Wis. 432, 118 N. W. 158.

Does the present case come within these principles? We think not. One of the cardinal rules is that the duty of the court below must be *plain*. The situation must be such that hardly more than a statement of the facts is necessary to convince the legal mind as to the duty of the court. Where there is no such clear and obvious duty based either upon common-law principles or upon express statute, but where questions of law or fact, or both, are involved of such difficulty that "a judge may reasonably, proceeding considerately, commit judicial error," the court will refuse to intervene under its power of superintending control, but will leave the parties to their remedy by appeal. *State ex rel. Milwaukee E. R. & L. Co. v. Circuit Court*, 134 Wis. 301, 114 N. W. 455. The duty of the court cannot be said to be *plain* in the present case: difficult questions were presented to the trial court upon the motions to vacate the service; questions in the solving of which there was ample room for the ablest trial judge, after mature consideration, to commit error.

The complaint alleged conspiracy to ruin the plaintiff's business. One of the principal overt acts of this conspiracy from which great damage is alleged to have resulted is charged to have been committed in the state of Wisconsin. The damages caused by the overt acts in pursuance of the conspiracy form the gist of the action, hence it would seem that a substantial part at least of the cause of action arose within this state. In a case where the cause of action arises within this state service may be made upon the agent of a foreign corporation "having charge of or conducting any business therefor in this state." Subd. 13, sec. 2637, Stats. (1898). The affidavits submitted upon the motions to vacate the service disclosed that all of the persons and corporations served on as agents were purchasing automobiles of their respective principals and selling the same under long written contracts prescribing prices, time of payment, territory in which to sell, and many other things. The contracts are very carefully

drawn and do not use the word "agent," but it is a very serious question, to say the least, whether agencies in fact are not created by all of them. We do not now say that such agencies were created, but simply that the question is not one that can be answered with confidence at once either way. It is worthy the considerate and careful attention of any court and may well admit of different opinions by equally able legal minds. One of the conditions essential to the successful invoking of the power of superintending control is therefore wanting.

It is urged that the case is one of such exceptional hardship that this court should intervene and stop the proceedings in the court below notwithstanding the duty may not be plain. The argument runs thus: The order denying the motion to vacate the service is not appealable, nor can it be reviewed on appeal from final judgment if the defendants appear and defend the case on the merits, because by such appearance they waive the question of jurisdiction (*Corbett v. Physicians' C. Asso.* 135 Wis. 505, 115 N. W. 365); hence they can only raise the question by staying out of court, allowing judgment by default for an immense sum perhaps to be taken against them, which judgment will stand as a menace to their credit for months until they can bring their appeal to a hearing.

The argument is not without its weight, but we cannot admit its conclusiveness. Logically followed out, it would mean that in every case where large damages are claimed this court may be called upon to investigate and decide any question as to the sufficiency of the service of the summons before another forward step is taken in the trial court. The result would be that *mandamus, prohibition,* and *procedendo* would gradually but surely be used to perform the ordinary functions of an appeal, which this court has declared is not the proper function of those writs.

By the Court.—Motion denied in each case with $10 costs.

TIMLIN, J. (*dissenting*). I feel obliged to dissent from the decision denying any relief to the moving parties. An action was begun in the circuit court for Milwaukee county by the *Velie Motor Vehicle Company*, which pleads that it is a corporation organized and existing under the laws of Illinois and has its principal office and place of business at Moline, in Illinois. It is engaged in the manufacture and sale of automobiles. Fifty-two foreign and four domestic corporations, all engaged in like business, are made defendants, and the action is one to recover damages in the sum of $500,000 suffered by the plaintiff and resulting from an alleged conspiracy between these fifty-six defendants to injure and destroy the said business of the plaintiff. In furtherance of the alleged conspiracy it is charged that the defendants except the Kopmeier Motor Car Company have formed a combination, confederacy, or agreement under the name of the Association of Licensed Automobile Manufacturers which constitutes an unlawful agreement or combination in restraint of trade, and notified the plaintiff to pay $14,000 and restrict its output and become a member. Upon plaintiff's refusal to accept these terms and become a member they warned plaintiff that unless it joined the association and complied with its demands the defendants would prevent it from carrying on its business and injure and ruin its business. Defendants have induced and are inducing persons having contracts with the plaintiff for the purchase of automobiles to break such contracts, and have made threats and misrepresentations to induce or coerce such persons so to do. They have also urged manufacturers of material and of parts of machines from whom plaintiff is accustomed to or obliged to purchase, not to sell to plaintiff, and have threatened not to buy from such manufacturers of material nor sell to such purchasers of automobiles if such manufacturers or purchasers dealt with the plaintiff. The complaint is silent with reference to where the conspiracy was entered into or where

these threats or inducements were made, but the fair inference is that it was outside of the state. It certainly is not shown that this took place within the state. There is then pleaded an act done within this state in pursuance of the conspiracy by which the Kopmeier Motor Car Company was induced to breach its contract with plaintiff and to refrain from exhibiting plaintiff's cars. Some of the defendants make no question of the regularity or validity of the service of the summons upon them, but the *Pierce-Arrow Motor Car Company,* the *Chalmers-Detroit Motor Car Company,* the *Locomobile Company of America,* and the *Pope Manufacturing Company* each appeared specially for that purpose and moved in the circuit court to have the service of the summons and complaint upon it set aside as unauthorized and invalid. The circuit court denied the motion.

Under the laws of this state the order refusing to set aside such service is not appealable. Sec. 3069, Stats. (1898); *Latimer v. Central E. Co.* 101 Wis. 310, 77 N. W. 155; *Welsher v. Libby, McNeil & Libby,* 106 Wis. 291, 82 N. W. 143. Nor can such an order be brought to this court by ordinary writ of error. *Paine v. Chase,* 14 Wis. 653; *Eaton v. Gillett,* 16 Wis. 546. Under the laws of this state the person upon whom defective service is made is not allowed, after he has appeared specially for that purpose and moved the court to set aside the service, to file an exception, thereafter to proceed to trial on the merits, and have this exception reviewed on appeal from or writ of error to the judgment. If he would assert his right to be notified or served according to law he must appear specially in the circuit court for the purpose of vacating the service only, and, if his application is denied, stay out of court thereafter for all purposes and submit to a judgment against him and take his chances upon appeal from or writ of error to that judgment rendered against him by default. In this way only can he assert his right to vacate the defective or unlawful service. *Corbett v.*

Physicians' C. Asso. 135 Wis. 505, 115 N. W. 365. The statute under which the service of the summons was in this case attempted is as follows:

"If against any other foreign corporation, to any such officer being within the state, or to any agent having charge of or conducting any business therefor in this state, or any trustee or assignee of such corporation, or upon the secretary of state, as provided in sec. 1770*b*. But such service can be made upon a foreign corporation only either when it has property within the state or the cause of action arose therein, or the cause of action exists in favor of a resident of the state, and upon the secretary of state only when the cause of action arises out of business transacted in this state or when the defendant has property therein." Subd. 13, sec. 2637, Stats. (1898).

The relators made proof by affidavit having annexed thereto their respective contracts with the person actually served that such person was not an agent, much less an agent having charge of or conducting business for the corporation in the state. The written instrument creating the relations between the *Pierce-Arrow Motor Car Company* and the person served shows that this corporation agreed to build for and sell to this dealer twenty Pierce-Arrow automobiles at prices fixed, payable in cash on delivery, and that the corporation agreed not to enter into any contract with any other person for the sale of its automobiles in certain specified territory during a stated period. Credit was to be extended to the dealer for parts and repairs ordered, and the corporation agreed to advertise the automobiles and to supply the dealer with catalogues and to sell in unoccupied territory at wholesale prices only to those who are regularly engaged in the retail business. The dealer agreed to use diligence to further sales, not to sell outside the designated territory without written permission of the corporation, not to sell cars of the model of the current year less than list prices, to pay for what he ordered, in the event of selling through other dealers to execute with the latter

a written contract similar to that existing between him and the corporation, not to contest certain letters patent nor to aid others in doing so, not to infringe on this patent, nor make, keep, sell, or deal in any gasoline automobiles not manufactured under license of this patent, not to sell, consign, or deliver any vehicle so licensed to any one making or selling, using or having on hand any unlicensed vehicles. The contract also contains provisions relating to a deposit to be made by the dealer with the corporation to secure payments and some other things not deemed relevant here. I see nothing in this which makes the dealer an agent of the manufacturer having charge of or conducting any business for such manufacturer. These words must have a reasonable construction. The dealer does not act for the corporation but for himself, hence is not an agent. He does not conduct business or have charge of business for the defendant but for himself. The contract is one of sale, not one of agency. *Willcox & Gibbs S. M. Co. v. Ewing,* 141 U. S. 627, 12 Sup. Ct. 94, is not in point, for there the contract contained provisions not found here and looking toward the relation of agency with express references to the person as agent.

But even in case where the contract is one of agency the statute requires something more. The plaintiff is a foreign corporation. Its domicile is in Illinois and its headquarters or principal office in that state. The gist of a civil action for conspiracy is not the combination but the damage done. The plaintiff was damaged, if at all, where it exists and has its property, business, and good will. It could not, therefore, sue another foreign corporation in this state by service even upon a conceded agent of the latter corporation, because the cause of action arose in Illinois, not in this state, and the plaintiff is not a resident of the state. The relators are not shown to have property within the state. For all these reasons the service was insufficient to confer upon the circuit court jurisdiction of the person of the relator first named.

I have not set forth an analysis of the contracts of the other three relators, because if either one is entitled to a writ from this court the majority decision is wrong and the writ should be granted. It is conceded that the power to grant relief in such case exists in this court by virtue of its supervisory control of the circuit court. Const., art. VII, sec. 3. The supervisory jurisdiction of this court is not to be confounded with the original jurisdiction thereof. I recognize that, in order to arouse the exercise of the supervisory power of this court, "the duty of the court must be plain, the refusal of the court below to proceed within its jurisdiction to perform that duty must be clear, the results of such refusal prejudicial, and the remedy, if any, by appeal or writ of error utterly inadequate, and the application to this court for relief speedy and prompt." *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591, 623, 624, 79 N. W. 1081. But I believe that this is clearly such a case, and a stronger case for the exercise of the supervisory power than the case last cited. I attach no weight to the objection that a writ of prohibition was asked for, or to technical rulings relating to the office and function of that writ. The law of this state as announced in the case last cited is, "The writ will be framed to meet the exigencies of the case." Id. 624. It may be a writ in the nature of a writ of *certiorari* or a writ in the nature of a writ of error would be more appropriate, but the discussion of the form or scope of these ancient writs as that scope was in an age when the judicial power was vested in the sovereign and the court exercised such jurisdiction as was delegated to it by the king's writ, seems to me to be small and pedantic in cases like this, where the constitution and not the writ is the measure of the court's jurisdiction. The relator has no other relief. It is asserting a constitutional right secured to it by the federal and state constitutions. To deny it a hearing on the question presented by withholding the right of appeal from the order and the right to review the

order on appeal from the judgment except on condition that it forego all other defenses to the action and at the same time to withhold from it any writ of review which this court is confessedly authorized to grant, is, I think, to deny to the relator due process of law. I see no reason for denying the exercise of this supervisory power in favor of one whose constitutional rights have been invaded and denied and who has no other remedy. It is said that the duty of the circuit court in the premises was not clear or obvious because the questions of fact or law arising on the motion were difficult. I do not think this can be the test. The rights of persons can rest on no such ground. Whether or not the questions are difficult should be determined upon hearing upon the alternative writ.

It is thought that if we grant a writ of review in this case we must do so in every case of alleged defective service of a summons or other original process by which a party is brought into court no matter what the amount involved. If this were true I should consider it no objection to the exercise of the supervisory control. The same objection could be made to the exercise of any other duty of this court. A statute annulling the rule of *Corbett v. Physicians' C. Asso.* 135 Wis. 505, 115 N. W. 365, would remove this objection. But it is not true that a judgment for a few dollars, temporarily in force, would be so destructive of credit or cause such injury and damage as a judgment for half a million dollars, and therefore the amount claimed goes to the hardship of the party seeking relief. It is not only in contravention of legal right but also a great hardship to compel a person to submit to the jurisdiction of a tribunal foreign to that person and distant, it may be, thousands of miles from his domicile, as a condition of asserting the merits of the controversy in that tribunal. It is not only illegal but also a great hardship to so entrap one who perhaps has diligently read the law and in attempted compliance with it has refrained from appointing an agent in this state. I cannot reconcile the decision of

the majority of the court in finally refusing to exercise its conceded power in the instant case with the law laid down in *State ex rel. Fourth Nat. Bank v. Johnson, supra,* and other cases in this court. I think that where a court has the power, and a probable legal wrong is shown for which there is no other remedy, it is its duty to exercise its power and hear the case. I have no doubt that my brethren of the majority take a different view of their judicial duty in refusing to exercise for the relief of this relator a power which they amply possess, but in my best judgment the failure to supervise and review the order in question would be a failure of judicial duty on my part, a thing which I hope those who come after us "shall never have tongue to charge me with."

I am authorized to say that Justices Siebecker and Kerwin concur in the foregoing.

Glasspoole, by guardian, Appellant, vs. McGuine, Respondent.

September 13—October 4, 1910.

Guardians: Death of insane ward: Settlement of accounts: Title to personalty.

After the death of an insane ward an administrator of his estate must be appointed before the accounts of the guardian can be adjusted by the county court or the heirs of the ward can acquire title to his personalty.

Appeal from a judgment of the circuit court for Buffalo county: E. W. Helms, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *C. M. Hilliard* and *Theodore Buehler,* and for the respondent on that of *S. G. Gilman.*

WINSLOW, C. J. This is an appeal from a judgment of the circuit court for Buffalo county reversing an order of the county court of the same county and vacating a previous judgment of said county court.

It is unnecessary to state the facts in detail. There are two questions presented by the record, viz.: (1) Can the accounts of the guardian of an insane ward be adjusted by the county court after the decease of the ward in a proceeding to which the guardian and the heir of the ward are the only parties, without any administration of the estate of the ward? (2) In such a proceeding can the county court render judgment directly in favor of the heir and against the guardian for the amount found due by the guardian to his ward's estate? Both of these questions must be answered in the negative. At the death of the ward the powers of the guardian ceased, the real estate descended to the heirs of the ward and the personal property to his personal representative (when appointed), in the same manner as if the ward had been sane. Sec. 3988, Stats. (1898). It follows necessarily that until the appointment of an administrator there was no person to be accounted with. The heir had no title to the personal property, no authority to represent the estate, and was entitled to no judgment against the guardian, however much the guardian may have been indebted to the estate. This was the view intimated, though not decided, in *Israel v. Silsbee,* 57 Wis. 222, 15 N. W. 144, and was also the view taken by the circuit court.

There are no other questions of sufficient importance to require treatment.

By the Court.—Judgment affirmed.

Hall, Appellant, vs. Bell, Receiver, Respondent.

September 13—October 4, 1910.

(1) *Pleading: Demurrer.* (2–7) *Contracts: Rescission for fraud: Equity: Adequate remedy at law: Pledges: Foreclosure.*

1. The test of a complaint on demurrer thereto for insufficiency, is not whether it states the precise cause of action intended, or the pleader appreciated the nature of his remedy, or asked for appropriate relief, but whether the facts stated expressly and inferentially, giving to the language the benefit of all reasonable intendments, show the plaintiff to be entitled to some judicial relief.
2. A court of equity should not entertain an action for rescission of contract merely upon the ground of fraud.
3. To warrant a court of equity in affording its jurisdiction for rescission on the ground of fraud, there must be, in connection with that element, special circumstances rendering rescission by act of the plaintiff and his remedy at law not adaptable to adequately cure the wrong.
4. Whether special circumstances are sufficient under the foregoing rule, is a matter for determination by the trial judge as one of fact within such range for the exercise of judgment, that the decision cannot properly be disturbed on appeal unless clearly wrong.
5. Under the foregoing any mere change in the circumstances of the defrauder leaving him or some other party legally liable who can be made to adequately respond in an action at law, is not sufficient.
6. If a person holds personal property as pledgee or rightfully, as security, he may enforce his right in that regard by foreclosure in equity, regardless of any legal or summary remedy he may have.
7. If a person invokes equity for relief by rescission of contract, who has in his possession property received on such contract, holding the same as security, and fails to state special facts in connection with his plea of fraud to warrant the action for rescission, but does state facts sufficient to enforce his right against the property as security, the action may stand as one for foreclosure.

[Syllabus by Marshall, J.]

Appeal from an order of the circuit court for St. Croix county: E. W. Helms, Circuit Judge. *Reversed.*

Equitable action for relief on facts set forth in the complaint, in addition to necessary allegations as to corporate existence of defendants, to the following effect: July 22, 1908, defendant trust company had in its possession $4,501 of plaintiff's money for the purpose of loaning the same in his behalf on gilt-edged, first-lien, real-estate securities, the loans to be on full title of record to the realty, and, before made, to be passed upon and approved by him. On the 1st day of October, 1904, the defendant Blue Grass Land Company agreed to sell to C. H., A. H., and R. C. Kimball certain land, specifying the same, situated in the state of Minnesota, giving them a land contract and taking a purchase-money note executed by them for $3,150. The land company had only an equitable interest in the land under an unrecorded land contract upon which a large part of the purchase money was yet to be paid. The land was not of sufficient value to adequately secure the amount due to said land company's vendor.

The Northern Blue Grass Land Company contracted to sell certain lands (specifying the same) in Vilas county, Wisconsin, to one Rauzi, taking with the contract his notes for $1,280, dated August 9, 1907. The Merrill Lumber Company owned the land subject to its outstanding agreement to sell the same to the defendant land company. January 15, 1908, the Northern Blue Grass Land Company assigned the Rauzi contract and notes to defendant land company. Neither of such land companies ever had any but an equitable interest in said land under the Merrill Lumber Company contract upon which a large amount of purchase money was unpaid, leaving the Rauzi contract and notes of little value as security for a loan. The stockholders and officers of said land companies and the defendant trust company were largely identical. July 22, 1908, said trust company, for purposes of its own, and in breach of its agreement with plaintiff, purchased the Kimball and Rauzi contracts and the accompany-

ing notes, converting his money to its own use and using the same therefor. It caused such securities to be assigned and delivered to him, representing, at the same time, that it was the owner of a first-class $5,000 note secured by a first mortgage on a Wisconsin farm, the papers being on deposit with the state treasurer, but would shortly be returned and then be substituted for said contracts and notes. Plaintiff took such contracts and notes only to hold temporarily, relying on the aforesaid representations and agreement. Said note and mortgage were, in due time, returned to said trust company, but, in breach of said agreement with plaintiff, it transferred them to other parties. He has made due demand therefor, but said trust company, in breach of its agreement, has refused and still refuses to comply therewith. Upon plaintiff discovering the facts, he notified the trust company that he would not accept such land-contract securities for his money and was ready to redeliver the same upon receiving said money. He is still ready to do so or to abide by the court's order in the premises. Said trust company, to wind up its affairs, has turned over its assets to the defendant Wisconsin Mortgage Loan & Investment Company, which was organized therefor by proprietors of the trust company, and has, in consideration of the premises, assumed and agreed to pay the liabilities of the old company, giving a bond to the state treasurer in the sum of $50,000 to that end. There is due on the Kimball notes $2,250 with interest from July 1, 1909, and on the Rauzi notes $1,152 with interest from August 9, 1908. The notes are of little value.

On such facts plaintiff prayed substantially as follows: 1st, for a rescission of the transactions between himself and the parties defendant; 2d, that they be required to pay to him his $4,501; 3d, that he be permitted to hold the securities until such payment and then turn the same over as the court may direct; 4th, that he be awarded such other relief as may appear equitable; and 5th, recover his costs and disburse-

ments. The Wisconsin Savings Loan & Trust Company and the Wisconsin Mortgage Loan & Investment Company severally demurred to the complaint, 1st, for insufficiency; 2d, to the jurisdiction of the court; 3d, for misjoinder of causes of action. Both demurrers were sustained and plaintiff appealed from the orders.

Sol. P. Huntington, for the appellant.

For the respondent there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *S. T. Swansen.*

MARSHALL, J. This case is governed by a few well established principles. The first of such principles is this: In testing a complaint on a demurrer for insufficiency, the pleading does not necessarily fail because the pleader did not state facts sufficient for the precise cause of action intended, or because he misconceived the precise nature of his cause of action and wrongly denominated it, or because of misapprehension of the nature of the relief warranted by the facts. If the pleading, giving it the benefit of every reasonable inference, expressly or by such inference, or both, states facts showing the plaintiff to be entitled to some relief within the competency of the court to grant, it states a good cause of action for such relief. Such is the liberal rule of the Code as early announced (*Morse v. Gilman,* 16 Wis. 504), and many times emphasized and given proper significance in recent years. *Emerson v. Nash,* 124 Wis. 369, 102 N. W. 921; *Bieri v. Fonger,* 139 Wis. 150, 120 N. W. 862; *Loehr v. Dickson,* 141 Wis. 332, 124 N. W. 293. In the most recent case the rule was tersely applied thus:

"A demurrer challenges the sufficiency of the complaint to state any cause of action, and must not be sustained in face of one which does by liberal construction state facts from which any liability results, although not for some or all the damages sought to be recovered."

So it is not necessarily fatal to the complaint in this case because it does not state a good cause of action in equity for

rescission of contract, if such be the fact. It should nevertheless have been held good if facts be stated sufficient to warrant some other relief.

The next principle involved is this: A court of equity should not entertain an action for rescission of a contract on the ground of fraud, merely because of the fraud, since the party wronged has, ordinarily, a perfect remedy at law by exercising his legal right to rescind by his own acts, and then suing to recover back what he parted with to his adversary by reason of the latter's fraud. *Johnson v. Swanke,* 128 Wis. 68, 107 N. W. 481.

It requires special circumstances in connection with the fraud, rendering the legal remedies not adaptable at all to cure the mischief, or not to adequately do so, to warrant a court of equity in affording its jurisdiction to correct the wrong. Whether such circumstances in any given case are or are not sufficient to satisfy the rule, is a matter for determination by the trial court as one of fact. Hence there is such room for the exercise of judgment that the trial court's decision cannot be successfully challenged unless it is clearly wrong.

The only special circumstance appearing here of any significance is that the defendant loan and trust company has, with a view to winding up its affairs, transferred its assets to the defendant investment company, it assuming and agreeing to pay all the trust company's liabilities. It is not alleged that the investment company is insolvent or that it is using, or proposes to use, the assets assigned to it other than to discharge the liabilities of the trust company, or that such assets are insufficient for that purpose. So far as the complaint goes, it may well be that the taking over of the trust company's liabilities by the investment company, and the latter's assumption of and agreement to pay the liabilities of the former, were circumstances beneficial to appellant. Therefore, we are unable to conclude that the trial court was clearly

wrong in holding that the complaint does not disclose special circumstances sufficient in connection with the fraud alleged to constitute an equitable cause of action for rescission.

If we could stop here the result would be an affirmance of the order appealed from. But there is another principle to be considered. Doubtless the learned trial court either overlooked such principle or did not give due significance to a feature of the pleading which stands out very plain, challenging our attention to one of the most familiar fields of equity jurisprudence.

According to the complaint appellant did not take the land contract and notes as owner. He took them only as security for delivery to him of the first-class $5,000 note and mortgage as soon as the same should come to the possession of the trust company, which occurrence was promised would soon take place. When the agreement in that respect was breached by respondent selling the promised securities to another party, appellant did not change his position. He demanded such securities in place of the land contract and notes, according to the agreement, insisting, as he has at all times, that he would not take the unsatisfactory papers for his money, but would hold them till such money should be returned, since he could not get the note and mortgage promised. So he only insisted upon retaining the papers in the same character they were received,—a mere pledge for the performance of the agreement to deliver to him the notes and mortgage for the money deposited to be loaned.

If a person holds property as security, either upon a chattel mortgage or as a pledge or other lien, a remedy in equity to foreclose is open to him, and the fact that he has one at law to recover the debt or enforce the liability for which he holds the security, or has a summary remedy to that end, does not militate against his right to such equitable remedy. *Boorman v. Wis. R. E. Co.* 36 Wis. 207; *Forepaugh v. Pryor,* 30 Minn. 35, 14 N. W. 61; *Packard v. Kingman,* 11 Iowa,

219; *Green v. Gaston,* 56 Miss. 748; *McDonald v. Vinson,* 56 Miss. 497; *Briggs v. Oliver,* 68 N. Y. 336; *Long D. Co. v. Mallery,* 12 N. J. Eq. 93; Jones, Chat. Mortg. § 777; Pom. Eq. Jur. (3d ed.) § 1231; 13 Am. & Eng. Ency. of Law (2d ed.) 830.

In the case cited from our reports, speaking of the tenure by which one holds personalty as security in the nature of a pledge, the court said:

"The right of a person in whose favor a lien exists, whether on real or personal property, to maintain an action in equity to have the amount of the lien determined, and to enforce payment thereof by a sale of the property, or otherwise, is too well settled to be questioned."

The Minnesota court said on the same subject: "The fact that there is a power of sale in a chattel mortgage does not affect the right to foreclose it by action." The doctrine is thus broadly stated in the elementary works: "Almost universally the remedy by foreclosure is proper regardless of legal or summary remedies."

So it seems there can be no doubt of appellant's right, on the facts stated, to relief by foreclosure, both as against the trust company and the investment company, which took a transfer of all the former's assets and assumed all its liabilities. So far, only, need we go to show that the complaint states a cause of action, and that the demurrer for insufficiency should have been overruled. The order went only on the ground of insufficiency.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

Timlin, J., dissents.

HALL, Appellant, vs. BANK OF BALDWIN, imp., Respondent.

September 13—October 4, 1910.

Contracts: Rescission: Equity: Adequate remedy at law: Insolvency: Conditions precedent: Restoration of property: Fraud: False representations: Matters of record: Notice: Negligence: Pleading: Liens: Flexibility of equitable relief.

1. A complaint for rescission of contract on the ground of fraud, to be sufficient for such purpose, must show special circumstances, in the judgment of the court, rendering rescission by act of the plaintiff and his remedy at law not adaptable at all to cure the wrong, or to do so adequately.
2. The decision of the trial court respecting sufficiency of special circumstances mentioned in the foregoing, relates to matter of fact and should not be disturbed on appeal unless clearly wrong.
3. A statement of circumstances, in connection with a showing of fraud warranting the wronged party in rescinding the contract by his own act, indicating that the wrongdoer is insolvent and there is no person adequately coercible at law to reimburse the plaintiff, are sufficient for equity to deal with the matter.
4. Neither an offer before suit to restore to the wrongdoer the property received from him on a contract rescindable for fraud, or plea of willingness to restore, is a condition precedent to maintenance of an action in equity for rescission, though failure to make such offer or plead such willingness are proper circumstances to be considered on the question of costs.
5. Where the representations, rendering a transaction rescindable for fraud, relate to matters of record, the wronged party is not chargeable with notice of the facts, but may rely on such representations, in the absence of knowledge of the truth or want of ordinary care in respect to the matter.
6. A person, induced by false representations to deal with another under such circumstances as to render him capable of rescinding the transaction on the ground of fraud, does not, within the limitations of the written law, lose any remedy to redress the wrong by mere delay to act in the matter, prior to receiving knowledge of the facts or failure by reason of want of ordinary diligence to obtain such knowledge.
7. The rule requiring an offer to restore what a person has received on a contract rescindable for fraud, or competency or willingness in that regard, goes no further than justice, as regards the wrongdoer, demands under the circumstances of the case, such

rule being purely of an equitable rather than of a technical nature.

8. Anything short of an unconditional offer by the defrauded person to restore what he received on a contract rescindable for fraud, or willingness, or competency in that regard, which does not prejudice the wrongdoer, as by a retention of money received in part payment upon the contract, leaving such wrongdoer liable to respond upon a basis which accords him full benefit of the money retained, is to all intents and purposes a return of such money.

9. Insistence, before suit by a defrauded person, upon retaining the property received upon a contract rescindable for fraud, persisted in by the pleading in an action in equity for rescission, does not necessarily render such pleading insufficient to state a good cause of action.

10. Where it appears necessary to the protection of a defrauded party that he should have a lien on the property received by him on a contract rescindable for fraud, in an equitable action to that end he may be adjudged to have a right equivalent to a lien on such property to secure restoration of the consideration parted with by him on such contract, and the court may adapt its decree so as to adjudge the extent of the lien, fix it upon the property, and provide for its just enforcement.

11. The foregoing rule is based on the broad doctrine that "such is the flexibility of courts of equity in adapting their decrees to the actual condition of the parties that its pervading excellence is, that it varies its adjustments and propositions so as to meet the very form and pressure of each particular case in all its complex habitudes."

12. If a person having possession of a subject of purchase, obtained in a transaction rescindable for fraud, be so circumstanced that it is essential for his protection that he retain such subject as security, and that may be done without injustice to the wrongdoer, a court of equity—without any offer by the former to return such subject, except upon condition of the consideration parted with therefor being restored, or there being protection to that end—may afford a remedy by rescission and retention of such subject as security for a return of such consideration, shaping the decree to fit the particular case whatever may be "its complex habitudes."

[Syllabus by Marshall, J.]

Appeal from an order of the circuit court for St. Croix county: E. W. Helms, Circuit Judge. *Reversed.*

Action for equitable relief. The complaint, aside from stating the corporate existence of the defendants, contains the following, in substance: October 1, 1904, defendant Wisconsin Blue Grass Land Company, having only an equitable interest under contracts from the owners, subject to large amounts of back taxes, unpaid purchase money, and prior mortgages, to certain lands in Wisconsin and Minnesota, agreed, in writing, to sell certain thereof (specifying land in Pine county, Minnesota) to David, Leonard, and Homer King, taking their notes therefor for upwards of $2,300 with the land contract, the latter being so executed as not to be recordable. The stockholders and officers of the land company and of the defendant bank were and are, in the main, the same persons. Said bank, through its officers, for the purpose of obtaining plaintiff's money, falsely and fraudulently represented to him that said indebtedness from the Kings was a first lien on the lands described in their said contract and was secured by said contract in first-class shape, and, further, that the Kings were men of great wealth, were of undoubted capability to pay said indebtedness, had entered upon the contract land and improved the same at large expense, and that if plaintiff would remit to the bank the amount of money represented by the notes it would cause the contract securing the same to be duly assigned and delivered to him. The bank then held said notes and contract to secure payment of indebtedness to it of said land company. The land was in fact of little value and was not adequate security for payment of said notes; the Kings had not entered upon the land nor improved the same, or paid anything upon the contract, neither were they men of financial responsibility, all of which facts were well known to the officers of said bank when they represented to the contrary as aforesaid. Relying on the representations so made, and not otherwise, plaintiff parted with money to said bank according to its proposition and took therefrom said notes and contract. As soon as he

discovered the truth of the matter he notified the bank that he would not accept said securities for his money, demanded a rescission of the transaction whereby he parted therewith, offered to retransfer the securities turned out to him upon refund being made, and still offers to do so. Said notes and contract are of small value. Said land company has paid on the King notes $680, and there is still due $1,700. Said banking corporation had the usual powers of such corporations under the laws of this state. Its charter has expired. It is insolvent and engaged in liquidating its affairs. The defendant investment company, with knowledge of the facts as to the insolvency aforesaid, took over the bank assets, agreeing to pay specified debts and liabilities, not including the liability to plaintiff, and is now realizing on such assets. Unless a receiver shall be appointed for said bank in the interests of all its creditors, and the said investment company restrained from using the bank assets, the whole thereof will be appropriated, excluding the plaintiff from any interest therein.

July 1, 1905, said land company agreed, in writing, to sell other of its aforesaid contract lands, specifying the same, to Blanche Kimball, taking her note for $1,312 for unpaid purchase money. Said bank, by its officers, with knowledge of the truth, for the purpose, through deception, of obtaining plaintiff's money for the said note and contract, represented to him that said contract and note were a first lien on the land and that the security for payment of the note was first class, whereas the land company had not title of record, or at all, except a contract interest with a large amount of the purchase money unpaid. Said land was of little value and the note and contract offered to plaintiff was not good security for the indebtedness represented thereby. The bank was the equitable owner of said securities. Relying upon the said false representations, plaintiff was induced to and did part with $1,312 for said contract and note and the same were, in due

form, caused by said bank to be assigned to him. There is unpaid on said note $820 with interest thereon from July 1, 1909. Said land company has deeded away its interest in said land and disabled itself from carrying out its said contract. Plaintiff has demanded payment of the sum due him upon the facts stated and payment has been refused.

Plaintiff prayed that the transaction between him and the bank be rescinded; that the latter be adjudged to pay the money advanced by the former for the securities; that he be allowed to retain them as security and return them as the court may direct upon the judgment being complied with; that the bank and its officers be restrained from exercising corporate rights, and that the officers of both corporations be restrained from doing anything with the bank assets pending the action; that a receiver be appointed to take over, preserve, and administer such assets, and plaintiff have such other relief as the court may deem just, together with the costs and disbursements of the action.

The defendant bank demurred to each cause of action, 1st, for insufficiency; 2d, for want of jurisdiction of the court of the subject matter; 3d, for misjoinder of causes of action. The demurrer was sustained upon the first ground and plaintiff appealed.

Sol. P. Huntington, for the appellant.

For the respondent the cause was submitted on the brief of *Baker & Haven.*

MARSHALL, J. This case, in some respects, is like *Hall v. Bell, ante,* p. 296. It is so in that the trial court tested the sufficiency of the complaint as one for rescission in equity. On that, as said in the former case, it is necessary that the complaint should disclose, in addition to the fact of fraud, special circumstances, in the judgment of the trial court sufficient to warrant equitable action. Appellant could have rescinded before suit and sued at law, so there was no neces-

sity whatever to resort to equity because of the fraud alone. If there were nothing to vary that, the court had no other course to pursue but to condemn the complaint. *Johnson v. Swanke,* 128 Wis. 68, 107 N. W. 481.

Here, unlike the former case, the complaint shows that there is no solvent party, liable at law for a return of appellant's money. The pleading states, in effect, that the corporation defendant which perpetrated the wrong is no longer in existence, except for the purpose of winding up its affairs; that it is insolvent; that the defendant investment company, with full knowledge thereof and all the facts, took the bank's assets, assuming and agreeing to pay specific liabilities only, leaving the others, and inferentially appellant, to be dealt with by such remedies as the law might afford; a very different situation than in the former case. If appellant had rescinded, restoring the objectionable securities so far as equity required, he would have greatly weakened his position. He would have parted with what he had and been unable to recover anything of the bank because of its insolvency. Possibly the restored property would have passed by the previous general transfer by the bank of its assets to the investment company. But in any event, the bank, unless prevented by judicial interference, could have prevented appellant from reaching the restored property in its hands. He could not have recovered at law of the investment company because of want of any legal liability in that direction. If he could have secured relief in such direction, it would have been by some equitable remedy. So he not only did not have any adequate remedy at law for the wrong done him and could not change that situation by any act of his, but it is difficult to see that he had any effective remedy at law at all.

The facts above referred to show, so clearly, sufficiency as regards the existence of special facts in connection with the fraud, that we are constrained to believe the trial court did not consider the complaint insufficient for want of such facts

under the rule in *Johnson v. Swanke,* 128 Wis. 68, 107 N. W. 481.

We hardly think the complaint was condemned on the ground of laches. Appellant had a right to rely upon the positive statement of fact regarding the securities without examining the records. The land and the records were in a sister state far removed, it seems, from appellant's location. A considerable portion of the contract indebtedness was from time to time paid, which well might, and inferentially did, give appellant a too favorable notion of the securities. As soon as he obtained knowledge of the facts, he insisted upon repayment of his money, so far as he had not obtained it on the securities, offering to return them as they then were, on condition of being reimbursed, necessarily, affording the wrongdoer full benefit of the money already collected. No fact is disclosed showing that appellant was negligent in not discovering the facts earlier, so we pass this branch of the case, assuming that the complaint was not condemned on the ground of laches, and concluding that, if it be otherwise, error in that regard was committed.

It is suggested that there is no cause of action stated for rescission because appellant neither before suit, nor in the complaint, unconditionally offered to return the securities as they were received, or the equivalent, or so offered to return the securities in the condition they were when the fraud was discovered. It is quite likely that somewhere within the scope of this subject the trial court found fatal infirmity in the complaint.

As to the element of offering to return, in a case of this sort, before suit, no such offer is essential to the cause of action. It may or may not affect, according to circumstances, the question of costs in case of plaintiff's recovering. That is elementary.

As to willingness to restore, or offer or competency in that regard, it goes no further than justice requires. The rule

in regard to the matter is equitable, not technical. Unreasonable or impossible things, which would not under the circumstances tend to secure equity, are not required. *Friend Bros. C. Co. v. Hulbert,* 98 Wis. 183, 73 N. W. 784; *Gay v. D. M. Osborne & Co.* 102 Wis. 641, 644, 78 N. W. 1079; *Gates v. Raymond,* 106 Wis. 657, 82 N. W. 530; *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074. The letter and logic of the cited cases is that anything short of a full refund which does not prejudice the wrongdoer, as retention of money received in part payment on a contract rescinded for fraud, leaving the wrongdoer liable to respond in money by way of damages, or as a debt, the retained money *pro tanto* reducing the liability, is, to all intents and purposes, a delivery of the money to the defrauder. So said in *Bowe v. Gage, supra.* So here a return of the partly paid out securities to the wrongdoer, the payments made operating, as they would, to discharge, *pro tanto,* its liability to restore appellant's money, would be, in effect, a delivery to the former of the money received by the latter on such securities, and all the return equity would require. So, on that score, there was ample room in the facts pleaded for the court to afford protection to the investment company and grant the prayer for rescission.

Does the insistence of appellant before suit, and in the complaint, upon holding the objectionable papers as security for a full return of his money, render the pleading defective? Must a person, necessarily, in a case of this sort, part with control of the property in advance of receiving back his money,—or may he retain it, if in the judgment of the court justice requires that to be done,—charged with a lien to the extent of money due him, contingent upon rescission? The latter would seem to be equitable. That equity has competency to afford such a remedy, we cannot doubt. Having such competency the court should not refuse to open its doors merely for want of a precedent. However, it seems that the principle involved has often been vindicated. The following

cases are sufficiently illustrative thereof: *Wickman v. Robinson,* 14 Wis. 493; *Taft v. Kessel,* 16 Wis. 273; *McIndoe v. Morman,* 26 Wis. 588; *Garner v. Leverett,* 32 Ala. 410; *Cooper v. Merritt,* 30 Ark. 686.

These authorities deal mainly with facts in relation to a vendee who has been induced by fraud of his vendor to purchase realty and improve or make payments for the same, and hold that, upon rescission, the injured party has the equitable right to a lien upon the subject of the transaction, where that is necessary for his protection, and that a court of equity should afford its jurisdiction to determine the measure of the lien, fix it upon the property, and administer the situation as justice requires in the peculiar circumstances of cases as they may be presented.

The principle is laid down generally, not with reference to any particular species of property, but rather in harmony with the boundless field of equity, where legal remedies for wrongs are inadequate, or do not exist at all, circumscribed descriptively in *Perry v. Board of Missions,* 102 N. Y. 99, 6 N. E. 116, as "the general doctrine of equity which gives a right equivalent to a lien when in no other way the rights of the parties can be secured." It is probably not a lien in the strict sense, but the right to a lien, somewhat on the logic of a vendor's right of lien for unpaid purchase money (*Berger v. Berger,* 104 Wis. 282, 80 N. W. 585), but reinforced by the elements of greater propriety for the particular remedy on account of the fraud, and greater necessity for it as a measure of protection for the injured party.

In *Taft v. Kessel, supra,* the court said:

"There are cases where courts of equity have held that a party claiming a right founded on a rescission of a contract, must have restored, or at least offered to restore, what he acquired, as the rule is at law. *Ship v. Wheeless,* 33 Miss. 646, 652. But there are others where it is held, that whenever the contract has been obtained by the fraudulent representations of the vendor as to his title, or where it is necessary for

the protection and indemnity of the vendee, he may insist upon a rescission and recovery of the amount paid, without first restoring possession. *Garner v. Leverett,* 32 Ala. 410, 413; *Coffee v. Newson,* 2 Kelly (Ga.) 442, 460. I approve the reasoning of these cases, and think it applicable to the present. We have held in this state, that the purchaser who has advanced any portion of the purchase money, has an equitable lien on the land as security, where the contract is rescinded on default of the vendor. *Wickman v. Robinson,* 14 Wis. 493. This being so, the retaining possession may be necessary in some cases for the protection of the purchaser; and it would be unreasonable in such cases to compel him to abandon it as a condition of his right to rescind."

In the early case of *Wickman v. Robinson, supra,* the court worked out the right of lien by the same process of reasoning, concluding, "We are satisfied that it is the clear result of equitable principles, that if he chooses to waive any right except the recovery of that which he has paid, he should be held to have a lien." Comparing the justice of the matter with the mere vendor's equitable right, the court said: "It is difficult to imagine upon what principle a court of equity could enforce the one and deny the other."

In *Garner v. Leverett, supra,* speaking to the subject of abandonment to the wrongdoer of the thing received from him as a condition of rescission, while recognizing necessity for such abandonment generally, except where retention is requisite as security, the court said: "Where fraud is the ground of the application, a different rule prevails. There an abandonment of possession is not necessary to the maintenance of a bill for rescission." And, further, in effect: A court of equity, unlike a court of law, may entertain a suit for rescission without a precedent return, or offer to return. It may require a return as a condition of rescission. "Such is the flexibility of courts of equity, in adapting their decrees to the actual condition of the parties, that its pervading excellence, in the language of Mr. Justice Story, is 'that it varies its adjustments and propositions so as to meet the very

form and pressure of each particular case, in all its complex habitudes.' "

From the foregoing we deduce as a principle, not suggesting but that it might be even more broadly stated, if a person in possession of a subject of purchase is so circumstanced that he has the right to rescind on the ground of fraud, and it is essential for his protection that he should be permitted to retain the subject of the transaction, holding the same as the property of the fraudulent vendor, subject to such person's equitable right, till he shall have received satisfaction for the consideration he parted with to such vendor in the transaction, a court of equity will, without any offer to return, except conditioned upon a restoration, or protection to that end, of the consideration parted with, afford a remedy for rescission and, incidentally, for retention of such subject and treatment thereof so as to protect such person in his right to a return of such consideration, shaping the decree so as to "meet the very form and pressure of each particular case in all its complex habitudes."

It would be taking too narrow a view of the scope of equity jurisdiction, to hold that, on the facts disclosed here, appellant cannot have relief for the wrong done him, without surrendering all right to the only means of at least partial pecuniary redress; that he must give up the securities, having possibly some value, and even the money received upon them, as seems to be claimed, for what might prove to be a mere shadow of relief, as regards the restoration of his former situation. There is no such infirmity in our jurisprudence. The complaint states a good cause of action, as indicated.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

TIMLIN, J., dissents.

HENRIKSON, Appellant, vs. HENRIKSON, Respondent.

September 13—October 4, 1910.

Equity: Specific performance: Oral agreement to convey land: Possession by vendee not essential: Fraud: Inadequate remedy at law.

1. As a general rule equity will not enforce specific performance of an oral agreement to convey land, although there has been part performance by the purchaser, unless he has taken possession of the land; but, even where possession has not been taken, if the vendor's refusal to convey will work a fraud upon the purchaser and the latter has no adequate remedy at law, specific performance may be enforced.
2. Where land is owned by several persons in undivided interests, some of such owners being incompetent, and plaintiff, one of the owners but not in possession, has made valuable and permanent improvements upon the land pursuant to an oral agreement with defendant, also an owner, that in consideration of the making of such improvements defendant would convey his interest to plaintiff, but defendant refuses to convey, equity may compel a conveyance, since defendant's refusal operates as a fraud upon plaintiff and the remedy at law is inadequate.
3. The remedy at law is inadequate in such a case because the oral agreement, being void under the statute of frauds, cannot serve as a basis for the recovery of damages, and because the implied obligation of defendant to return what he has received under the oral agreement does not go beyond reimbursement of plaintiff to the extent that he benefited the defendant's undivided interest, while as to the other owners there is no basis for a recovery at law.

APPEAL from a judgment of the circuit court for Pierce county: E. W. HELMS, Circuit Judge. *Reversed.*

This action was brought to enforce specific performance of an oral contract to convey real estate. After certain admissions and denials the defendant set up affirmatively a general settlement and satisfaction of all matters of difference between the parties, including matters set forth in the complaint, and that the plaintiff accepted $1 and other valuable consideration in satisfaction and discharge of all causes of

action, suits or controversies, claims and demands against the defendant. The facts sufficiently appear from the findings.

The court found that on or about May 12, 1901, Paul C. Henrikson, the father of plaintiff and defendant, died intestate at the town of Gilman, county of Pierce, and at the time of his death was the owner in fee simple of the lands described in the complaint; that at the time of his death said Paul left him surviving his widow, then sixty-eight years of age, and eight children, including the parties hereto, all of whom were of full age and competent, except Hannah Henrikson, now about fifty-six years of age, blind from infancy and mentally undeveloped, and Soren Henrikson, now about thirty-five years of age, who is also mentally incompetent; that on the day Paul C. Henrikson died the dwelling house upon the premises described in the complaint was totally destroyed by fire and the members of the family then at home were left without a house in which to live; that the family residing on the farm at that time consisted of the widow of Paul C. Henrikson and the said Hannah and Soren; that after the burning of the dwelling house the premises described in the complaint were worth about $2,000, and there was some personal property upon the farm, the value of which was not shown, and money belonging to said Paul to the amount of $700; that after the death of said Paul and the burning of said dwelling a consultation was had between the widow and various of the children of the family, and it was arranged that the widow and Hannah and Soren should live temporarily in the granary upon said farm, and some talk was had as to the construction of a new house upon the premises; that it seems to have been agreed among the children that the widow, said Hannah, and Soren should remain upon the farm and some provision should be made for their maintenance upon the farm, being the premises described in the complaint; that a few days after the said 12th day of May, 1901, the defendant, then being a storekeeper in a vil-

lage in Dunn county, had a conversation with the plaintiff, who was a farmer in Dunn county, at that time living and boarding with the defendant, concerning the rebuilding of a house upon the farm above mentioned and making provision for their mother and the incompetent children; that as a result of said conversation it was agreed between plaintiff and defendant that the plaintiff should go to Pierce county and provide upon the farm a comfortable and convenient home for the mother of the parties and the family remaining upon the farm, it being understood that the $700 then on hand should be used in the building of a house upon said premises, and that plaintiff should put in time and money and labor with said $700 sufficient to make a comfortable and convenient home for the family; that in consideration of the performance on the part of the plaintiff of said agreement the defendant promised on his part that when the mother was dead he would transfer to the plaintiff his one-eighth share in said farm as a remuneration to the plaintiff for the things to be done and performed by said plaintiff under said agreement, but no part of said agreement was ever reduced to writing; that thereafter and during the summer of 1901 the plaintiff caused to be built upon said farm a good and substantial dwelling house, the $700 above mentioned being expended toward the building of said house and the plaintiff doing a considerable amount of labor by way of digging the basement, hauling material with his team, and otherwise, probably spending two months or more in said work, although the matter is left somewhat indefinite by the testimony; that in addition to the labor so expended plaintiff purchased several hundred dollars' worth of material which was used in the construction of said house, probably more than $500, although the testimony is quite indefinite as to the exact amount; that in the summer of 1902 plaintiff spent considerable time and money in constructing an additional cistern upon the premises, and bought and erected a windmill, all

at considerable expense of time and money; that on the 16th day of April, 1908, the widow died, and thereafter plaintiff demanded of defendant that he convey to plaintiff his share in said farm, being one eighth thereof, but this the defendant refused to do; that no demand has ever been made by plaintiff of the defendant, except as above, for any remuneration for his services performed by plaintiff pursuant to said agreement in or about the erection of said house, cistern, or windmill, or for repayment to plaintiff of any sum expended by him in connection therewith; that on or about the 17th day of January, 1905, a settlement was had between plaintiff and defendant of certain differences then existing between them, and the plaintiff made and signed and delivered to defendant a writing to that effect, but the materials furnished and services performed in making the improvements in question were not considered or taken into account or settled for in said settlement, nor was the transfer of defendant's interest to the plaintiff on account of said improvements considered or settled; that after the death of said Paul C. Henrikson the widow remained in full and complete possession of the premises described in the complaint up to the time of her death, and the plaintiff between the 12th day of May, 1901, and the beginning of this suit never in any manner occupied the farm or buildings thereon, and never had possession thereof during the time he worked upon said farm in the construction of the house and other improvements mentioned in these findings; that during said period he simply lived as a member of his mother's family in the same way as is ordinarily done by any person employed to do work of the kind he was doing.

The court concluded that the contract between plaintiff and defendant was void because it was not in writing, and that there was never any such part performance on the part of plaintiff as would entitle him to specific performance of the contract. Judgment was ordered against the plaintiff

for dismissal of the complaint, with costs. Judgment was entered accordingly, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *N. O. Varnum,* and for the respondent on that of *Warren P. Knowles.*

Kerwin, J. The question presented is whether upon the established facts the plaintiff is entitled to specific performance of the oral contract set out in the case. It is settled by the findings and not denied that the defendant agreed orally with the plaintiff to convey to plaintiff his one-eighth interest in the real estate described in the complaint upon the death of the mother of plaintiff and defendant in consideration of the erection on said real estate of certain permanent improvements and furnishing the material and doing the work necessary therefor; that plaintiff performed and furnished in accordance with such agreement and duly performed all the conditions of such agreement on his part to be performed; that after the death of the mother defendant refused to convey to plaintiff. The contention on the part of the respondent is that, although the appellant fully performed on his part in pursuance of the contract, he cannot compel specific performance, because he did not take possession and has an adequate remedy at law. The general rule is that part performance by the purchaser under an oral agreement to convey is not sufficient to take the contract out of the statute of frauds, unless possession is taken by such purchaser. The general rule has often been laid down by this court. *Smith v. Finch,* 8 Wis. 245; *Brandeis v. Neustadtl,* 13 Wis. 142; *Ellis v. Cary,* 74 Wis. 176, 42 N. W. 252; *Blanchard v. McDougal,* 6 Wis. 167; *Koch v. Williams,* 82 Wis. 186, 52 N. W. 257; *Popp v. Swanke,* 68 Wis. 364, 31 N. W. 916; *Harney v. Burhans,* 91 Wis. 348, 64 N. W. 1031; *Horn v. Ludington,* 32 Wis. 73. In the above and similar cases it will be seen that the purchaser, or party complaining because

of failure to carry out the oral agreement, could be restored to his former position in an action at law. In other words, equity will not enforce an oral agreement where possession has not been taken, though partly or even fully performed by one party, because he has an adequate remedy at law.

It is true strong language is used in some of the cases in stating the general rule, to the effect that part or even full performance of an oral contract to convey real estate by the purchaser is not sufficient without possession on the part of the purchaser. As for example in *Popp v. Swanke,* 68 Wis. 364, at p. 368 (31 N. W. 916), quoting from *Smith v. Finch,* 8 Wis. 245, the court said:

"It is only in cases where the defendant would be enabled to practice a fraud upon the complainant unless the contract is specifically executed that a court of equity will interfere. If the purchaser has gone into possession of the land so as to render him liable as a trespasser if the agreement is held void, the court will enforce performance."

But it is also true that there is another class of cases resting upon the well settled doctrine that where there is performance or part performance by the purchaser under and in pursuance of an oral contract to convey land, though no possession be taken by the purchaser, and the vendor after performance by the vendee refuses to convey, equity will enforce specific performance where the vendee has no adequate remedy at law and the refusal to perform on the part of the vendor would work a fraud upon the vendee. The following are some of the authorities illustrative of this rule: *Cutler v. Babcock,* 81 Wis. 195, 51 N. W. 420; *Martineau v. May,* 18 Wis. 54; *Ingles v. Patterson,* 36 Wis. 373; *Littlefield v. Littlefield,* 51 Wis. 23, 7 N. W. 773; *Wall v. M., St. P. & S. S. M. R. Co.* 86 Wis. 48, 56 N. W. 367; *Brown v. Hoag,* 35 Minn. 373, 29 N. W. 135; *Bennett v. Dyer,* 89 Me. 17, 35 Atl. 1004; *Seaman v. Aschermann,* 51 Wis. 678, 8 N. W. 818; *Scheuer v. Cochem,* 126 Wis. 209, 105 N. W. 573; *Freeman v. Free-*

man, 43 N. Y. 34. The cases in this court which lay down the doctrine that possession is necessary recognize the exception. In *Harney v. Burhans*, 91 Wis. 348, at p. 352 (64 N. W. 1031), the court says:

"It was early decided by this court (*Smith v. Finch*, 8 Wis. 245) that the full payment of the purchase money is not sufficient to take a case out of the statute, so that specific performance will be decreed, unless accompanied by *actual possession or some act whereby the vendee has received an injury for which a court of law cannot give complete remedy.*"

And in *Wall v. M., St. P. & S. S. M. R. Co., supra*, the court, after laying down the general rule that payment of purchase money alone is not sufficient to take the case out of the statute of frauds, but that payment of any considerable part of the purchase price and the vendee's entry into possession and making valuable improvements would constitute such part performance as will take the case out of the statute of frauds and justify the enforcement of specific performance, further says (p. 58):

"So where there has been such part performance by the vendee that it would operate as a fraud upon him to allow the vendor to repudiate the contract, the same will be enforced in equity."

And in *Littlefield v. Littlefield, supra*, it was held to be the settled doctrine of this court that the mere payment of the consideration, unaccompanied by any other act, is not such part performance of a parol contract for the conveyance of land as will authorize specific enforcement, but that there must be some other act done to raise an equity, "such as taking over possession of the lands sold under the contract by the purchaser; *or one party must have induced the other to so act that if the contract be abandoned he cannot be restored to his former position, and a refusal to perform the contract will operate as a fraud.*" To the same effect are cases in other

courts. *Bennett v. Dyer,* 89 Me. 17, 35 Atl. 1004, and *Brown v. Hoag,* 35 Minn. 373, 29 N. W. 135.

The making of valuable permanent improvements on the land by the vendee, in pursuance of the agreement and with the knowledge of the other party, is always considered to be the strongest and most unequivocal act of part performance by which a verbal contract to sell land is taken out of the statute. Pomeroy, Spec. Perf. secs. 126–130 and cases cited; *Scheuer v. Cochem,* 126 Wis. 209, 105 N. W. 573; *Littlefield v. Littlefield,* 51 Wis. 23, 7 N. W. 773. In the case before us the plaintiff made valuable and permanent improvements on the land in question under and in pursuance of the oral agreement that defendant would convey his one-eighth interest as specified. Now, unless plaintiff has an adequate remedy at law, the refusal on the part of defendant to carry out the agreement operates as a fraud upon the plaintiff. The question, therefore, arises whether the plaintiff has such remedy. This turns upon whether he can be placed in his former position by recovering compensation for the improvements made upon the land. The defendant owned a one-eighth and the plaintiff a one-eighth interest in the land, the remaining six-eighths being owned one-eighth by each of the other six heirs, two of whom were incompetent. So, unless plaintiff can recover from defendant the full value of the improvements made, he has not an adequate remedy at law. The improvements made, so far as they benefited the property, benefited the whole, and the interest of each owner in the real estate would be enhanced in value by the services performed and money expended by the plaintiff, and the question is whether the plaintiff can recover damages beyond what defendant has been enriched by the improvements. The oral contract being void, it cannot serve as a basis for the recovery of damages. *Brandeis v. Neustadtl,* 13 Wis. 142; *Ellis v. Cary,* 74 Wis. 176, 42 N. W.

252; *Rowell v. Barber,* 142 Wis. 304, 125 N. W. 937. As was said by this court in *Brandeis v. Neustadtl, supra,* in a case of oral contract for purchase of land, "a contract declared void by statute is in all respects a nullity." Such a contract is not voidable, but absolutely void, and affords no protection to the party claiming under it. *Brandeis v. Neustadtl, supra.* The person receiving money, however, under a void contract for the sale of land is bound to return it, on the theory that it is the money of the other party to the void contract and which the holder is bound to return. This rule would require a defendant who had become enriched by valuable improvements placed upon his land under a void contract to respond to the extent of such enhancement, upon the principle that the law implies a promise to pay for them. But the law imposes no liability on one who has under a void contract caused such improvements to be made upon another's land, because, the contract being void and the defendant receiving no benefit, there could be no implied promise to respond for a benefit bestowed upon another. *Dowling v. McKenney,* 124 Mass. 478; Keener, Quasi-Contracts, 279–282; Browne, Statute of Frauds (5th ed.) § 118*a; Dunphy v. Ryan,* 116 U. S. 491, 6 Sup. Ct. 486; 2 Page, Contracts, § 751; *Banker v. Henderson,* 58 N. J. Law, 26, 32 Atl. 700; *Gazzam v. Simpson,* 114 Fed. 71; *Day v. N. Y. C. R. Co.* 51 N. Y. 583. The doctrine is well stated in Browne, Statute of Frauds (5th ed.) § 118*a,* as follows:

"The rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid, or recover for the services upon a *quantum meruit,* applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered; it does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the plaintiff and defendant such as by the statute of frauds must be in writing. Such payment is not a payment to the defend-

ant's use in the sense of the rule. It is a payment to his use, only if he chooses to abide by the contract, and it is his right to refuse to do that."

So in Keener, Quasi-Contracts, 278, 279, the rule is laid down that where one renders services under a contract void by the statute of frauds, in order to recover he must show that the defendant, if he is not compelled to pay the plaintiff for that which he has received, unjustly enriched himself at the plaintiff's expense.

The defendant here, owning a one-eighth interest, could be enriched by the improvements only in the ratio of his interest to the interest of other owners; therefore could not in an action at law be compelled to respond for the whole improvement. The plaintiff, of course, could not recover for the benefits, if any, to his own one-eighth interest, the expense of which improvements he might never have incurred but for the promise of defendant to convey. Nor does it seem from the record that there is any basis for recovery at law from any of the other owners for any part of the expense of the improvements. There is certainly none for recovery from the incompetents. Independent of statute the general rule is that a tenant in common cannot recover at law against his cotenant for improvements made upon the common property. 1 Washb. Real Prop. § 894 and cases cited. Whether plaintiff could have any allowance against any of the tenants in common of the property in an action of partition or other equitable action or proceeding we need not consider and do not decide, because that would be an equitable action and not an action at law and no answer to the plaintiff's present action. In order to warrant the court in denying specific performance in the instant case it must appear that the plaintiff has a remedy at law, and such legal remedy must be "as adequate, comprehensive, and effectual as that afforded by a court of equity." *Butterick P. Co. v. Rose,* 141 Wis. 533, 539, 124 N. W. 647. Even if an action at law could be

maintained against all the heirs to recover for the benefits received, it is by no means clear that such action would afford an adequate remedy, because the reasonable cost of the improvements might not turn out to be the measure of their enrichment.

The theory of the liability of the defendant in the instant case is that the law raises an implied obligation on the part of defendant that he return that which he has received under the void contract. And this obligation requires him to respond only for what he has received and not for what others have received because of the void agreement. The obligation rests upon the benefit received, and the extent of the obligation is measured by the benefit. It is true that there are some cases holding a different doctrine, and which appear to hold that the liability is not measured by the benefit received. *Parker v. Tainter,* 123 Mass. 185, belongs to this class. However, in *Dowling v. McKenney,* 124 Mass. 478, the question was squarely met by the court, and it was held that, where one advances money to or performs services for another based upon a contract void under the statute of frauds, he can only recover against such other so much as defendant has been enriched by the transaction. This we believe to be a sound doctrine, and the only logical basis of recovery in such a case. Upon that doctrine, of course, the plaintiff here has no adequate remedy at law, therefore is entitled to specific performance of the contract. It follows, therefore, that the judgment must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to enter judgment for plaintiff for specific performance.

ROWLEY, by guardian *ad litem*, Respondent, vs. ROWLEY, imp., Appellant.

September 14—October 4, 1910.

Wills: Construction after decree assigning property: Application by infant to sell lands: County and circuit courts: Jurisdiction: Equity: Action to remove cloud on title.

1. A decree of a county court assigning the estate of the testator pursuant to the will does not transfer title or in any way alter the disposition of the property made by the will.
2. Upon application of an infant for sale of her land the county court is authorized to construe a will so far as it is necessary to determine whether and to what extent the infant is the owner of the land sought to be sold for her benefit.
3. In case the application for sale is made after administration closed and after the estate has been assigned, the county court is not authorized to bring in adversary parties claiming title under the will, but may require as a preliminary that an action for construction of the will against such adversary parties be brought in the circuit court.
4. A court of equity will not entertain a suit for construction of a will where there is no trust, equitable incident, or other independent ground of equity jurisdiction.
5. Where an infant claims to own real estate in remainder and a life tenant is in possession and other persons make an adverse claim to this remainder or some interest therein, if the infant desires to have the land sold for her support, she may maintain a suit against such claimants to remove a cloud on her title, and in this suit may have a construction of the will where the claim of such adverse parties rests upon their construction of such will.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a demurrer to the complaint.

For the appellant there was a brief by *Perry, Morton & Kroesing,* and oral argument by *George E. Morton.*

For the respondent there was a brief by *Buell & Lucas,* and oral argument by *F. W. Lucas.*

Timlin, J. This action was begun in the circuit court for Dane county. It appears from the amended complaint that A. A. Rowley of Dane county executed his last will on April 14, 1902, and died in October of the same year. This will was admitted to probate on December 10, 1902. The testator left surviving him his widow and six children, four of whom were under the age of twenty-one years, and since the death of the testator his son Jesse C. Rowley died leaving surviving him his widow and one daughter. All the living children of testator, all the children of a deceased child, and testator's widow are made parties defendant. The will gave to testator's widow during her lifetime his homestead in the village of Middleton in Dane county, but provided that after the death of the widow "the homestead above mentioned shall go to my little child Newman Carl and another child not yet born at the time of making this will, to be owned by them jointly after the death of their mother." The child last mentioned is the plaintiff, *Arlene*, who was born after the making of the will and before the death of the testator. Other real estate and all personal property were given to the testator's widow. On September 24, 1904, judgment was entered in the county court of Dane county assigning and setting over all the property to the devisees in the will mentioned according to the provisions of the will. The homestead, which is alone in question here, consisting of lots 8, 9, 10, and 11 in block 7 in Middleton, Dane county, Wisconsin, was assigned "unto the said minor children Newman Carl Rowley and *Arlene Rowley* in equal shares, subject to the life use of the said homestead by said widow, Emma Rowley, in accordance with the provisions of said will." The widow has ever since been and now is in exclusive possession of said homestead. After judgment assigning the estate Newman Carl Rowley died, an infant, leaving surviving him no widow or child. After the administration had been completed it was found that there was practically no

property coming from said estate to the widow or minor children which produced any income available for their support. The homestead contains more land than is necessary for the residence of the widow and the child *Arlene,* and several of the lots included within the homestead are nonproductive property, and the expenses of maintenance of the homestead and the taxes thereon far exceed the income from the said property. Owing to the financial condition of the widow she is unable to properly maintain herself and *Arlene* and meet the expense necessitated by keeping the homestead. She thereupon, as guardian for *Arlene,* made application to the county court for leave to sell the lands of the infant. Upon the hearing on this application a question was raised as to whether the estate devised to Newman Carl Rowley and *Arlene Rowley* was a joint estate so that upon the death of said Newman Carl the title would vest in *Arlene* by right of survivorship. The county court thereupon ruled that it had no authority to construe said will in this regard, and that before sale would be ordered the question above mooted must be determined by suit for construction. On this showing the plaintiff, *Arlene,* demands that judgment be entered construing the will of said A. A. Rowley in respect to the question of survivorship.

The judgment of the county court assigning the homestead pursuant to the will did not transfer title to or in any way alter the disposition of the property made by the will. *Smith v. Smith,* 140 Wis. 599, 123 N. W. 146, and cases; *Williams v. Williams,* 135 Wis. 60, 115 N. W. 342, and cases. Upon application of the infant for a sale of the land the county court could decide whether the infant was the owner of the land sought to be sold for its benefit. In making this decision it must ascertain and decide upon the meaning of the will, at least to this extent. But that court did not have upon such application the adversary parties before it, because in the instant case the application is made after ad-

ministration closed and after the estate has been assigned, and the doubt as to title arose by the death of one of the devisees after such assignment. Neither is the county court authorized to bring in such adversary parties upon such an application. It was therefore proper for the county court to require and for the plaintiff to begin an independent action in the circuit court where all adverse claimants could be made parties. *Gianella v. Bigelow,* 96 Wis. 185, 71 N. W. 111. A court of equity will not entertain a suit for construction of a will where there is no trust or other independent ground of equity jurisdiction. 3 Pomeroy, Eq. Jur. §§ 1155, 1158. But in the instant case the plaintiff claims to own the remainder subject to the life estate and present possession of her mother, who desires to join with her in the sale, and at the same time plaintiff is unable to avail herself of her right to sell this property to prevent waste and to use the proceeds for her support and maintenance because of the adverse claim made by other defendants to own an interest therein as heirs of Newman Carl. The defendants deny her claim and assert title in themselves. This furnishes the equitable feature or incident (*quia timet*) which gives that court jurisdiction to proceed to construe the will so as to enable the plaintiff to avail herself of her rights in the real property. She has no remedy at law against these claimants who are not in possession. Equity is not subject to the reproach that there is no relief for the plaintiff in such case.

By the Court.—Order affirmed.

KOLA LUMBER COMPANY, Appellant, vs. STOUGHTON WAGON COMPANY, Respondent.

September 14—October 4, 1910.

Appeal: Findings, when disturbed.

Upon evidence fairly justifying either of two inferences, the decision of the trial court must control.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Plaintiff brings this action to recover the purchase price of a carload of wagon bottoms shipped by it to defendant without any order from defendant requesting it so to do. The bottoms so shipped were used by defendant. Prior to the making of the shipment the defendant had entered into an executory contract with the Ellisville Lumber Company to furnish it a number of wagon bottoms. A jury was waived, and the trial court found that the car in question was shipped in part execution of the contract between the Ellisville Lumber Company and the defendant; that it was shipped by the plaintiff for and upon the credit of the Ellisville Lumber Company; and that the Ellisville Lumber Company and not the plaintiff was the real party in interest. On the findings so made judgment was entered dismissing the complaint.

For the appellant there was a brief by *Tenney, Hall & Tenney,* and oral argument by *F. W. Hall.*

For the respondent there was a brief by *Olin & Butler,* and oral argument by *H. L. Butler.*

BARNES, J. If any contract relation existed between plaintiff and defendant, it existed by implication only. Certain facts were testified to from which the court might well have inferred an implied contract on the part of the defend-

ant to pay plaintiff for the lumber. Other facts were shown from which it could be legitimately inferred that the plaintiff shipped the lumber in part execution of the contract between the Ellisville Lumber Company and the defendant and upon the credit of the Ellisville Lumber Company. It is as logical to draw the latter inference from the evidence as it is the former.

"Upon evidence fairly justifying either of two inferences, the decision of the trial court must control." *Spuhr v. Kolb*, 111 Wis. 119, 120, 86 N. W. 562.

It is not the custom of this court to embody in its opinions the evidence sustaining the findings of trial courts, inasmuch as no useful purpose would be served by so doing.

By the Court.—Judgment affirmed.

SIMON and others, Respondents, vs. WEAVER and others, Appellants.

September 14—October 4, 1910.

Corporations: Fraud of promoters: Equity: Action by stockholders: Pleading: Joinder of causes of action: Parties.

1. A complaint in equity by stockholders in a corporation, which alleges in apt terms that defendants, the promoters and officers of the corporation, collusively and fraudulently, without giving any equivalent therefor, conspired to and did deplete the treasury of the corporation of large sums of money, by procuring options on mining properties in their own names and selling the same to the corporation at a large profit, taking so-called commissions upon sales of its stock, and issuing orders upon the treasury in their own favor, for which there was no consideration; and which seeks to recover back for the benefit of the corporation the sums so paid out and to cancel the orders still outstanding, states a cause of action.
2. Where such complaint states wrongs against the corporation only and relief on its behalf only is prayed, there is but one primary

right sought to be enforced and but a single cause of action stated, although a number of wrongful acts by which the fraudulent scheme was consummated are set out and different forms of relief are asked.

3. Where in such a case it is evident from the allegations of the complaint, showing that the defendants are the directors and control the corporation, that the action would not be brought or prosecuted in good faith by the corporation, it is properly brought by stockholders and the corporation is a proper party defendant.

APPEAL from an order of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is a suit in equity brought by three stockholders on behalf of the defendant the *Iron King Mining Company,* a corporation, to recover damages sustained by the corporation on account of the alleged fraud of the defendants, who were promoters of the corporation, and for other relief. The complaint alleges that the plaintiffs are stockholders in the defendant the *Iron King Mining Company,* a Wisconsin corporation; that this action is brought by the plaintiffs on their own behalf as stockholders of the said *Iron King Mining Company* and on behalf of said *Iron King Mining Company* and for the benefit of said corporation, the *Iron King Mining Company,* and for the benefit of all stockholders in said corporation similarly situated to these plaintiffs; that the defendants *I. Weaver, William Alexander, Adolph Fey, F. A. Philbrick,* and *Charles Wild* were and are the officers and directors of the said defendant the *Iron King Mining Company,* a corporation; that said corporation was incorporated under the laws of Wisconsin on April 27, 1903, and the articles of organization were signed by *I. Weaver, William Alexander, Adolph Fey, F. A. Philbrick,* and *Charles Wild,* who will hereinafter be referred to as the promoters; that prior to said date and on the 4th day of April, 1903, said promoters, in pursuance of the fraudulent scheme hereinafter set forth, had held a meeting, at which they pretended

to elect themselves directors and to elect the defendants *Charles Wild, Adolph Fey, F. A. Philbrick,* and *I. Weaver* president, vice-president, secretary, and treasurer, respectively, of said corporation, the same being some twenty-three days prior to the filing of the articles of organization of the said corporation; that thereafter the said promoters, in pursuance of a fraudulent plan and scheme by them entered into for the purpose of cheating and defrauding said company and the other stockholders thereof, continued to act as directors and officers of said corporation, and, by reason of the stock fraudulently taken by them as hereinafter more fully set forth, they continued to have and to execute full and absolute control of said corporation and continued to hold all offices thereof, and sought to and did in every way render said corporation helpless so far as any action might be taken against them, the said promoters; that said promoters continued so to act and to elect and to re-elect themselves as directors and officers of said company up to and including April 10, 1906; that thereafter and on March 29, 1907, said promoters, in pursuance and fulfilment of said plan and scheme, pretended to hold a meeting of the stockholders of said company for the purpose of dissolving said corporation, but what action was taken and the effect thereof plaintiffs are not advised, by reason of the fact that no record of the same was kept; that subsequent thereto and on the 12th day of October, 1908, notice was duly published as by the statutes required, by James A. Frear, secretary of state, that the corporate rights and privileges granted to said corporation would be forfeited on January 1, 1909, unless an annual report of said corporation was filed prior thereto and payment made of forfeit fee and cost of publication; that, as plaintiffs are advised and believe, said promoters, as directors and officers, were fully informed of said proceedings had and taken by said secretary of state, and though in duty bound so to do, yet, by reason of said fraudulent plan and scheme to cheat

and defraud as aforesaid, they failed and neglected to comply with said notice, and that the corporation is now dissolved except for the purpose set forth in sec. 1764, Stats. (1898), and that, as provided by said Statutes, the said promoters are still the directors of the affairs of such corporation and the officers thereof; that the purpose of said corporation, as expressed in the said articles of organization, was to prospect for and mine iron ores and to buy and sell or option lands for such purposes, and to do any and all things necessary to the carrying on the general mining business; that the said articles provided that the capital stock of said corporation should be $200,000 and the same should consist of 200,000 shares, each of which shares would be of the face or par value of $1; that said promoters had not and none of them had had any mining experience or any practical knowledge of the conduct of a mining business prior to the organization of said corporation, and then had and at all times mentioned in this complaint had no plan, purpose, or intention of entering upon the conduct of such business, but that within a few months preceding the organization of said corporation and the said pretended meeting thereof held on the 4th day of April, 1903, said defendant promoters had conceived the fraudulent plan and scheme of securing certain options on lands without consideration or for a purely nominal consideration and then to organize said corporation, and, in pretended consideration of the transfer of said options so secured, to fraudulently and secretly cause to be issued to themselves a large majority of the stock of said corporation without paying or giving or transferring to said company anything therefor, and fraudulently and by false and fraudulent misrepresentation procuring others to purchase the remaining shares of stock for money consideration and to reserve to themselves a commission therefrom, and likewise fraudulently and secretly to issue or cause to be issued to themselves, for various pretended purposes and services on behalf of said corporation,

such money as others might be induced to pay into the treasury of said corporation, and in this manner and by kindred practices in harmony therewith to loot the treasury of said proposed corporation and cheat and defraud said corporation and the other subscribers and stockholders who might be induced to pay their money into the treasury of said corporation in exchange for its stock; that pursuant to said scheme to cheat and defraud the said corporation and its future stockholders and in carrying out said plan so formed, the said promoters prior to April 4, 1903, acquired two certain options to drill and prospect for iron ore.

The complaint then sets out a description of the two options, denominating the first as the "Domke option" and the second as the "Kuehn option," and proceeds to allege:

Both of said options recite that they are given for a good and valuable consideration and recite no further or other consideration, and plaintiffs allege that said promoters and none of them ever parted with any money, property, or other thing of value in exchange for or payment of said options; that under each of said options the said promoters acquired no right in and no possession of said premises during the term thereof, except so far as was necessary for the purpose of prospecting for iron ore, such prospecting to be done by means of a diamond drill, or otherwise, and the said parties agreeing to leave said premises in as good condition as the same were before said prospecting was done as near as practicable and to pay for the damages that might be done to crops by such prospecting; that, as appears from said option, said promoters acquired no surface or agricultural rights in said premises thereunder of any kind or description whatsoever and acquired solely the right to drill and prospect thereon for iron ore, and that said promoters and none of them at no time ever acquired any further, other, or different interest therein; that by an assignment executed and acknowledged April 4, 1903, the said promoters, in furtherance of their

said plans and schemes to cheat and defraud the said company and the stockholders thereof, assigned or pretended to assign to the *Iron King Mining Company,* the said proposed corporation, the same then having no legal existence, the said options, the said assignment reciting that the same was for $1 and other good and valuable consideration, but reserved in said assignment the surface rights and a royalty of any or all ores that might be mined therefrom, at certain terms specified in the complaint,—the said promoters at that time well knowing that they had no surface rights of any kind, order, or description.

That on May 27, 1903, being more than a month after the organization of the said corporation and after the election of the said defendant promoters as directors thereof and while they were acting as such directors and officers, the defendant *Charles Wild,* being then the president of said company, but acting for and on behalf of the remaining defendant promoters, all of whom were then directors of said company, and all except the defendant *William Alexander* being also officers and all the officers of said company, and pursuant to the scheme of the said promoters to cheat and defraud the said corporation and its stockholders, caused to be executed to him by the North Freedom Land & Mining Company a like option under like terms and conditions to drill on (here follows description of the lands), the same being known and hereinafter described and referred to as the "Quandt option;" that the consideration for said option was expressed therein as a good and valuable consideration; that as a matter of fact, as plaintiffs are informed and believe, the said *Charles Wild* and the said remaining promoters and no one of them ever parted with any money, property, or any other consideration of any kind, order, or description for said option; that if any money was paid therefor the same was paid directly out of the treasury of the said defendant corporation by the said *I. Weaver* as the officer of said company, the *Iron King Min-*

ing Company, as appears from order No. 2 in the order book of said corporation and by order No. 16; that notwithstanding said fact, and said defendant promoters and all of them well knowing that said option and all right, title, and interest therein belonged to said corporation by reason of said corporation having paid therefor, and in pursuance of their preconceived scheme of cheating and defrauding said corporation, the *Iron King Mining Company,* and any stockholder unfortunate enough to pay his money into its treasury, the said promoters, in execution of their scheme to cheat and defraud as aforesaid, caused the said *Charles Wild* to execute a pretended assignment of an undivided four-fifths interest in said last named Quandt option to the remaining promoters on the 11th day of June, 1903, although the said corporation had previously and on the 2d day of June, 1903, paid, as plaintiffs are informed and believe, the sum of $500 for said option; that subsequent thereto and on July 20, 1903, said promoters, in furtherance of their preconceived scheme to cheat and defraud the said *Iron King Mining Company* and the stockholders thereof, pretended to assign all the right, title, and interest in all royalties held by them under the Domke and Kuehn options, and likewise, by a separate instrument in writing, pretended to assign and convey to the said *Iron King Mining Company* all their right, title, and interest under the Quandt option, retaining therefrom the surface rights, both of said assignments being expressed to be for $1 and other valuable considerations, notwithstanding that said defendants and all of them at said time knew that they had not and none of them had any surface rights in said Quandt option, and that whatever rights might exist under said option were already vested in the said corporation, the *Iron King Mining Company;* that the said Domke option continued in force for the term of two years from the date thereof, being the 26th day of January, 1903, it being provided that the same might be extended for the further term

of two years at the option of the party of the second part by giving written notice and paying the sum of $25 as and for a consideration of such extension; that the said Kuehn option provided that the same should be in force for the term of one year from the date thereof, to wit, the 23d day of February, 1903, and that the same might be extended for the further term of two years at the option of the parties by giving written notice and paying the sum of $1 as a consideration for such extension; that the said Quandt option, dated May 27, 1903, provided that the same should continue in force until September 1, 1904; that said Quandt option further provided that drilling should commence on or before October 1, 1903, and that before a drill should be placed on said premises for prospecting purposes the sum of $5 should be paid to the said Quandt and a receipt from said Quandt taken and given to the North Freedom Land & Mining Company.

That thereafter and on the 21st day of January, 1904, the said promoters, fearful lest any of the money of said corporation had escaped them as a result of the various operations hereinafter more fully detailed, well knowing that they had not and never had had any surface or agricultural rights in the premises covered by the various options, and to further carry out their scheme to cheat, defraud, and rob the corporation and its stockholders, passed a resolution on said date as directors of said company, and, pursuant thereto, assigned or pretended to assign their alleged pretended and imaginary surface rights under the said Quandt and Kuehn options for and in consideration of the sum of $15,000, said resolution providing that the same should be paid out of the company's moneys not otherwise appropriated on orders drawn; that subsequent to the organization of said company and beginning on the 15th day of August, 1903, the said promoters secretly caused to be issued to themselves and to others for their benefit, entirely without consideration to the said company, stock of said company of the aggregate par value of

$125,000; that no record or minutes of said transaction or the reason therefor was ever entered upon the books or records of said corporation, and the said stock so taken by said promoters and by them issued to others for their benefit was taken and issued entirely without consideration of any kind, order, or description, and in pursuance of the preconceived intent and carrying out of the plan of said promoters to cheat, defraud, and rob the said corporation and its stockholders; that the said stock, at the time the same was so wrongfully taken by said defendant promoters, was, as plaintiffs are informed and believe, of the cash or market value of fifty cents per share, and the value of the entire amount so taken was the sum of $62,500; that said promoters on and after said dates likewise sold, on behalf of the said corporation, stock of the par value of approximately $26,000, and, pursuant to their scheme to defraud said corporation and its stockholders, retained from the price at which said stock was sold certain sums as pretended commissions for the sale thereof; that the total amount of moneys so retained as pretended commissions by said defendant promoters, as plaintiffs are informed and believe and allege the fact to be, was the sum of $1,300; that said promoters likewise issued and caused to be issued to themselves orders of said corporation amounting in the aggregate to $19,678.60; that, as plaintiffs are informed and believe, there was paid to said promoters on account of said orders, out of the treasury of said company, the sum of $4,678.60, and that there remain outstanding as charges against the said company orders in the sum of $15,000; that of said sum of $4,678.60, approximately $1,777.85 were or may have been issued for the benefit of the said corporation; that as to the remainder thereof in the sum of $2,900.75, as plaintiffs are informed and believe and allege the fact to be, they were totally without consideration and were issued solely for the benefit of the said promoters and in pursuance of their scheme to cheat and defraud the

corporation and its stockholders; that, as plaintiffs are informed and believe and allege the fact to be, the total amount of the value of said stock taken by said promoters, the sums retained by them on account of pretended commissions, and the sums realized by them on account of the orders fraudulently issued to themselves without any consideration to said corporation, all as aforesaid, is the sum of $66,700.75.

That this action is brought by the plaintiffs and not by the *Iron King Mining Company,* the defendant corporation above named, for the following reason, to wit: that the board of directors of said corporation, together with all the officers thereof, is at the present time, and ever since its organization has been, composed of members all of whom were promoters of said corporation above named and all of whom are defendants herein, and that the same board is made up of and absolutely controlled and dominated by them, the said promoters; that this action, if brought by the present board of directors or the present officers of the said corporation or by any board of directors or by any set of officers that could be elected by the stockholders of said corporation, would not be prosecuted in good faith or for the benefit of said corporation, by reason of the fact that the said board of directors and the said defendant promoters are one and the same persons and the identical persons who formed and organized and always controlled the company for the said purpose of cheating and defrauding the company and its stockholders, and that, having fully accomplished the said plans and schemes, plaintiffs have made no demand or request upon said corporation or board of directors thereof to bring this action, well knowing such demand would be useless, and for this reason the said corporation, the *Iron King Mining Company,* for whose benefit and the benefit of whose stockholders this action is brought, has been made a party defendant hereto.

Wherefore plaintiffs demanded judgment on behalf of said corporation against the defendants *I. Weaver, William*

Alexander, Adolph Fey, F. A. Philbrick, and *Charles Wild* (1) for the sum of $66,700.75 with interest from August 15, 1903; (2) that said defendants and all of them be enjoined and restrained from paying to themselves any money on account of the said $15,000 of orders outstanding or on any other account whatsoever, and that the orders in said sum of $15,000 be canceled and annulled; (3) that the plaintiffs recover all damages and losses sustained by them by reason of the fraud of the said defendant promoters; (4) that the plaintiffs be allowed, and that there be adjudged out of the sum recovered for said corporation from the said defendant promoters, a reasonable attorney's fee for the payment of plaintiffs' attorneys herein; (5) that plaintiffs recover all other costs and disbursements by them incurred on account of this action of every nature whatsoever; and (6) that the plaintiffs and said defendant *Iron King Mining Company* have such other relief as may be just and equitable.

The defendants demurred to the complaint on the grounds (1) that the court has no jurisdiction of the person of the defendants or any of them or the subject of the action; (2) that the plaintiffs have not the legal capacity to sue; that if any cause of action exists it should be brought in the name of the *Iron King Mining Company;* (3) that there is a defect of parties plaintiff in this, that the said *Iron King Mining Company* should be made a party plaintiff; (4) that several causes of action have been improperly united in said complaint; (5) that the said complaint does not state facts sufficient to constitute a cause of action; and (6) that the said action was not commenced within the time limited by law and is barred by the provisions of sec. 4222, Stats. (1898).

From an order overruling the demurrer the defendants appeal.

For the appellants there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

For the respondents there was a brief by *Aylward, Davies, Olbrich & Hill,* and oral argument by *M. B. Olbrich.*

VINJE, J. 1. This is a suit in which the powers of a court of equity are invoked to right wrongs flowing from the fraudulent scheme of promoters and officers of a corporation to diminish its assets to their own profit. The complaint in apt terms alleges that the promoters collusively and fraudulently conspired to, and actually did, without giving any equivalent therefor, deplete the treasury of the corporation of the various sums therein set out, and it demands that these sums be paid back by the wrongdoers into the treasury of the corporation. Tested by the principles laid down by this court in numerous cases, it cannot be said that the complaint fails to state facts sufficient to constitute a cause of action, and the demurrer on that ground was properly overruled. *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229; *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342; *Hayward v. Leeson,* 176 Mass. 310, 57 N. E. 656.

2. Appellants strenuously contend that the main cause of action is one at law for damages for an executed conspiracy, while joined to this are other causes of action for which equitable relief is demanded, and rely upon the case of *Pietsch v. Krause,* 116 Wis. 344, 352, 93 N. W. 9, to sustain the proposition that such causes of action cannot be joined. An examination of that case will disclose that the complaint first set out a cause of action and asked relief in behalf of the corporation, and then proceeded to state a cause of action for damages and demanded relief in behalf of the plaintiffs individually, and it was held that the two could not be joined. But in this case wrongs against the corporation only are set out, and relief in its behalf only is asked. Clearly the *Pietsch Case* is not analogous.

It is, however, a misconception of the complaint before us to say that it states more than one cause of action. True, a

number of wrongful acts are set out, and different forms of relief are demanded, but that is only alleging the various ways in which the fraudulent scheme was consummated, and demanding appropriate relief for each separate wrong flowing therefrom. It is not alleging separate causes of action. As was said by this court in *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 139, 79 N. W. 229:

"There is but one subject of action,—the conspiracy to defraud and its consummation to the damage of plaintiff. All the allegations of fact are parts of the presentation of that one subject. The test of whether there is more than one cause of action stated or attempted to be stated in a complaint is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication."

To the same effect are *Gager v. Marsden,* 101 Wis. 598, 77 N. W. 922; *Adkins v. Loucks,* 107 Wis. 587, 83 N. W. 934; *Herman v. Felthousen,* 114 Wis. 423, 90 N. W. 432. In these cases the question has been so fully discussed, and the distinction between alleging separate causes of action and alleging one subject of wrong out of which separate wrongs may flow calling for different relief is so clearly pointed out, that it is deemed neither necessary nor advisable to further extend the discussion of the subject.

3. It is evident from the allegations of the complaint that the corporation would not have brought nor prosecuted the suit in good faith, and it was therefore properly brought by the plaintiffs, and the corporation was a proper party defendant. *Luther v. C. J. Luther Co.* 118 Wis. 112, 94 N. W. 69.

The last ground of the demurrer was expressly waived upon the oral argument, and it is not deemed necessary to discuss the others.

By the Court.—Order affirmed.

WING and another, Respondents, vs. STACKHOUSE and another, Appellants.

September 14—October 4, 1910.

Sheriffs: Wrongful attachment of personal property: Temporary possession: Surrender pursuant to agreement: Liability for conversion.

1. Mere temporary possession by a sheriff of personal property which he has wrongfully attached as the property of another, and which he does not sell but subsequently turns over, in pursuance of a settlement of the attachment suits, to the duly authorized agent of the person from whom he took it, gives no right of action to the owner against the sheriff for a conversion of the property.
2. In an action against a sheriff for conversion, where it appears that at the direction of the attorney for numerous attaching creditors, among whom were the plaintiffs themselves, the sheriff attached the property in question, which was in fact the property of the plaintiffs, but that before a sale of the property a settlement was made by all the attaching creditors, whereby they received payment of a portion of their respective claims and the sheriff was directed to turn over the property attached to a person claiming to act as the agent for the debtor, the plaintiffs, being chargeable with knowledge of all the facts in regard to the settlement and not having disavowed the same or offered to return the money received in settlement, cannot be heard to say that the sheriff was guilty of a wrongful act in turning over the property according to the settlement agreement.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an action for conversion of twelve bundles of green hides in December, 1908. At the time of the alleged conversion the plaintiffs were partners dealing in hides and skins at Whitehall, Wisconsin, and the defendants were respectively the sheriff and deputy sheriff of Sauk county. The evidence showed that on November 16, 1908, the plaintiffs, through the plaintiff *Terry,* purchased the hides in question

of one George Kurth, who was then a butcher in business at Spring Green, Wisconsin, and paid cash for them, Kurth agreeing to ship them to Whitehall the next day. At the same time *Terry* advanced to Kurth $100 for hides to be shipped in the future. Kurth did not ship the hides purchased, but allowed them to remain in the scale room attached to his butcher shop, with tags on bearing the names of plaintiffs. About the middle of December, 1908, Kurth absconded, and on December 21st seven of his creditors commenced attachment suits, and the defendant *Bauer*, as deputy sheriff, seized Kurth's property in the attachment actions, but did not find the twelve bundles of hides involved in this action. All the attachment suits were brought by Thomas W. King as attorney, and among them was an action by the plaintiffs to recover the $100 advanced. About December 24th *Bauer* found the hides involved in this action in the scale room and asked the attorney, King, what he should do. King told him to attach them and he did, removing them to the butcher shop with the other property. The butcher shop was owned by one Fronk, who was also one of the attaching creditors. About the middle of January, 1909, George Kurth's father came to Spring Green, claiming to have authority from his son to adjust his son's financial affairs. He entered into negotiations with King to settle up all of the attachment claims and finally arranged to settle them all for forty cents on the dollar. He had previously arranged to turn the property over to Fronk. Mr. Kurth, Sr., paid King the money in settlement of all the claims, and King (Deputy Sheriff *Bauer* being absent from town) turned all the attached property, including the hides in suit, over to Fronk, who afterwards sold it. The plaintiffs received the $40 from King in full settlement of the attachment suit, but the precise date of the receipt is not in evidence. The payment was made, however, sometime before the commencement of present action, and soon after it was made the plaintiffs knew that Kurth had

never delivered the hides which *Terry* bought November 16th. The plaintiffs have never repudiated settlement or offered to return the money received.

In response to two questions the jury found (1) that the defendant *Bauer* took the identical hides purchased by the plaintiffs on November 16, 1908; (2) that the value of such hides on November 23d was $75.16. Judgment being rendered for the plaintiffs on this verdict, the defendant appeals.

For the appellants there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

James A. Stone, for the respondents.

WINSLOW, C. J. The evidence shows without dispute that the deputy sheriff never in fact sold the property in question. He attached it, removed it to the butcher shop, and when the attachment claims were settled turned it over with all the other attached property to Mr. Kurth, Sr., who claimed to be acting for his son in making the settlement. Had George Kurth himself settled up with his attachment creditors and thereupon received back from the deputy sheriff the hides in question the case would be in principle indistinguishable from the case of *Enos v. Cole,* 53 Wis. 235, 10 N. W. 377. An action of trespass for the recovery of nominal damages would have been the only remedy of the plaintiffs against the deputy sheriff, for the reason that the temporary possession held by him would constitute no injury. Had it been shown that Mr. Kurth, Sr., was the duly authorized agent of his son to make the settlement and close out the business the same result would doubtless follow. But the proof seems to have been defective on this point and only showed that Mr. Kurth, Sr., claimed to be his son's agent.

Now, it may be barely possible that had the deputy sheriff not levied on the hides in question Mr. Kurth, Sr., would not have turned them over to Fronk, though this is the merest possibility, and verdicts are not to be based on mere possibili-

ties. Conceding that there is such a possibility, still we think the evidence demonstrates to a moral certainty that the mere temporary interference of the sheriff had no effect on the course of events, and that Kurth, Sr., would have followed exactly the same course in settling up the attachment suits and turning over the property to Fronk had the interference of the deputy sheriff never taken place.

We also think that under the circumstances shown in this case the plaintiffs are in no position now to attack the elder Kurth's authority to act for his son. They either knew or were charged with knowledge of all the material facts with regard to the settlement of the attachment suits, and they have not disavowed the settlement, but, on the other hand, stand here with the fruits of the settlement in their possession. Long before this action was commenced they knew that George Kurth never delivered the hides which they bought but retained them in his own possession; they knew that he absconded while presumably still in possession of them; they knew that the elder Kurth assumed to settle the suits for his son, and they must have known that the way in which he did it was by taking the property which his son left and transferring it to Fronk. It seems to us that they have very clearly approved of the transaction and cannot now be heard to say that the act of the deputy sheriff in surrendering the attached property to the elder Kurth was wrongful. It may be that they have an action against the elder Kurth for conversion of their property, but that question of course is not here.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the defendant notwithstanding the verdict.

KLUETER, Respondent, vs. JOSEPH SCHLITZ BREWING COMPANY, Appellant.

September 14—October 4, 1910.

Contracts: Construction: Ambiguity: Parol or extrinsic evidence affecting writing.

1. Oral testimony is not admissible to contradict or vary a written contract, but, nevertheless, is admissible to apply the contract to the subject with which it deals and to show facts and circumstances characterizing its making, where—by reason of ambiguity either in the language or the writing itself, or therein when applied to the subject with which it deals—that is reasonably required to enable the court to read the writing in the light of such characterization and thus discover what the parties intended to express therein.
2. A written contract is to be held to mean what the parties thereto intended it should, if such meaning can be found, by aid of rules for construction, within the reasonable scope of its language.
3. The language of a written contract is not open to construction unless its meaning is ambiguous, and then, by the aid of such rules, it must speak for itself, the words, however, not being extended beyond their reasonable scope, in the light of the characterizing circumstances, in order to effect an intention not fairly expressed therein.
4. When the language of a written contract is plain it is not open to construction, but though plain, viewed exclusively, if not plain, when applied, by the aid of oral evidence or otherwise to the subject with which it deals, extrinsic evidence showing the circumstances characterizing the making of the contract, is permissible for the purpose of clearing up the obscurity.
5. The rule as to construction of contracts that "where the meaning is plain and leads to no absurd consequences there can be no reason for refusing to admit the meaning which the words naturally present," suggests the propriety of extrinsic evidence to apply the contract to the subject with which it deals, and if manifest unreasonableness thus appears, the propriety of evidence of the circumstances characterizing the making of the writing to aid in clearing up the obscurity
6. Extrinsic evidence is not admissible for the direct purpose of creating ambiguity in the language of a written contract which is plain, viewed exclusively, but that does not militate against the

rule that extrinsic evidence is proper to apply a contract, plain in its literal sense, to the subject with which it deals, and, if the effect is to disclose ambiguity, like evidence to show the circumstances characterizing the making of the contract.

7. From the foregoing the rule results that ambiguity in a written contract calling for construction may arise as well from words plain in themselves but uncertain when applied to the subject matter of the contract, as from words which are uncertain in their literal sense.

8. The rule that contracts which are plain are not open to construction, and the one that evidence of conversations between parties respecting the contract prior to and inclusive of the making thereof, are not admissible to explain it, and the one that extrinsic evidence is not proper to vary or contradict a written contract, all harmonize with the rule that—where a contract, though plain in its literal sense, is uncertain, when applied by oral evidence or otherwise to the subject with which it deals—such evidence is proper to show the circumstances characterizing the making of the contract in aid of its construction, which latter rule is a logical deduction from the basic one that "where a contract is plain and leads to no absurd consequences it must speak for itself," and otherwise it may speak in the light of the circumstances under which it was made.

9. Where a conversation, had at the time of making a written contract, relates to some condition with reference to which it was made, and such conversation is referred to in the writing, without specifying such condition, so as to make it a part of the contract, then evidence of such conversation to the extent of showing such condition, is within the rule that extrinsic evidence characterizing the making of a contract is admissible in aid of construing it, in harmony with the rule that evidence of mere conversations between parties in making a written contract, inclusive of the final closing of it, is not admissible to explain it.

10. The rule that—when a contract is ambiguous, viewed in the light of the subject matter with which it deals, though plain in its literal sense, it may, by aid of extrinsic evidence showing the circumstances characterizing its making, be read very different from its literal sense, so long as the reasonable scope of its words be not exceeded, if necessary to give effect to the purpose expressed and intended—does not involve any modification of the contract but "has relation to the application of the language used to the subject within the contemplation of the parties as represented by the situation then existing and the surrounding circumstances, which it may be assumed they then had in view."

[Syllabus by Marshall, J.]

Per BARNES, J., *dissenting:*

1. The written contract in this case, so far as it directed the shipment of ice from M. to certain points "via Ill. Cent. R. R.," which railroad extended from M. to those points, was not ambiguous, although said railroad did not reach the loading place of the ice in M. and although other shipments were directed to be "via" other railroads which did not reach M. at all.
2. The fact that the contract stated that the orders for shipment of the ice were sent "as per" a former conversation, did not render parol evidence admissible to show a prior agreement for shipment in some other way than that definitely and unambiguously stated in the writing.
3. Conversations leading up to the making of a written contract are admissible to explain an ambiguity in the writing, but cannot be shown to import ambiguity into an otherwise unambiguous contract.
4. The mere fact that a contract may appear unreasonable to this court in view of events which have transpired since it was made, or even in view of the situation of the parties when it was made, is not a sufficient reason for holding the contract to be ambiguous.
5. Where a contract does not express the true agreement of the parties, its reformation should be by appropriate action in equity, not by importing ambiguity into the contract and then interpreting it to mean something different from what its words plainly imply.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover on contract a balance claimed to be due on a sale of ice.

The complaint is to this effect: Plaintiff contracted to sell defendant ice at thirty cents per ton delivered on cars on the Chicago & Northwestern Railway at Madison, Wisconsin, and then shipped as directed by defendant and at its expense. Pursuant to such contract, in March, 1909, plaintiff delivered ice free on board on such road which was in due course received by defendant at destinations as ordered by it, whereby it became indebted to plaintiff in the sum of $696.43, which became due April 1, 1909, but has not been paid. Judgment was demanded accordingly.

Defendant thus counterclaimed: Defendant's agent, Campbell, under only special authority to secure prices on ice at Madison, Wisconsin, to be shipped to points in Illinois, informed his principal that it could obtain ice of plaintiff, free on board cars at such point, for thirty cents per ton. Thereupon, and on March 2, 1909, it gave plaintiff an order in writing to ship specified quantities of ice to specified places over the Illinois Central Railroad. Pursuant thereto plaintiff sent defendant the quantities of ice ordered, but over the Chicago & Northwestern Railway, rendering it necessary for defendant to pay for freight charges $418.98 in excess of what it would have cost to ship the ice over the Illinois Central as directed. Such road reached Madison so the ice could have been shipped as ordered. Plaintiff at no time before accepting the order made any complaint as regards shipping specifications.

Indebtedness to the amount of $277.45 was admitted and judgment tendered therefor.

Plaintiff replied that he informed defendant's agent, Campbell, he would furnish ice at thirty cents per ton, loaded on cars on the track of the Chicago & Northwestern Railway Company; that the latter could make his own agreement with the agent of that company; that they visited such agent, at which time Campbell did make such arrangement and then contracted in defendant's behalf for ice to be loaded on the Chicago & Northwestern Railway Company's track at Madison; that in March thereafter plaintiff received from Campbell orders for the ice in question, which was loaded and shipped out as per the understanding with him.

There was evidence tending to show these to be the facts: Campbell had a conversation with plaintiff, as claimed in the reply. He was informed that ice would have to be loaded on the Northwestern track and shipped out under agreement with the agent of that road. The Northwestern track, not the Illinois Central track, reached the point for loading.

Cars of the Illinois Central Company could have been, without extra charge, placed at such loading point and delivered over the Northwestern track to the Illinois Central Railroad Company at Madison, but such method of handling the ice was not as satisfactory to plaintiff as shipping out over the Northwestern to the regular junction point with the Illinois Central Railroad, as was done. After Campbell had been informed of the price for ice to be shipped in that way, he, in defendant's name, gave a written order, pursuant to which the shipments in question were made, which order, so far as relates to this case, is as follows:

"Klueter Ice Co., Madison. As per your conversation with Mr. Campbell to supply ice at the rate of thirty cents per ton (30), we herewith send you the following orders to be shipped at once;" then followed specifications of the amounts to be shipped to specified points, followed by the words "Via Ill. Cent. R. R.," the whole concluding with language not material to the controversy and signed, "Yours truly, *Jos. Schlitz Brew. Co.,* Campbell."

Evidence was permitted tending to establish that the term "As per your conversation," etc., referred to the fact of Campbell having been informed, in a conversation with plaintiff, that the price for the ice was made on condition of its being shipped out over the Northwestern Railway; that shipments would necessarily start on the Northwestern road as only the Northwestern Company had a track reaching the loading place,—such facts being claimed to be material on the question of the meaning of the term "Via Ill. Cent. R. R." Evidence of the sort indicated and other evidence as to the meaning of such term, was permitted under objection, defendant claiming that the order was unambiguous, plainly requiring shipments over the Illinois Central road, and plaintiff claiming that it was ambiguous, viewed in the light of the circumstances under which it was made, and that such circumstances showed that shipment over the Northwestern road, so far as

practicable, and then by way of the Illinois Central road, was contemplated.

The case was submitted to the jury, resulting in the following special verdict: (1) Plaintiff stated to Campbell, in substance, before or at the time the contract was made, that all ice would have to be forwarded out of Madison over the Chicago & Northwestern Railway. (2) Campbell gave the order for the ice with that understanding. (3) He had apparent authority to make the contract. (4) The words of the order did not call for shipment of ice out of Madison, Wisconsin, on the Illinois Central Railroad to points of destination.

Judgment was rendered on the verdict in accordance with the prayer of the complaint and defendant appealed.

For the appellant there was a brief by *Aylward, Davies, Olbrich & Hill,* and oral argument by *C. N. Hill.*

For the respondent there was a brief by *Bashford & Welton,* and oral argument by *C. R. Welton.*

Marshall, J. The first error assigned is that the contract was in writing, therefore parol evidence thereof was improperly admitted.

It may well be admitted, for the purposes of this case, that the contract was in writing. The trial court, as we understand the record, so held and admitted evidence to aid in construing the language used in the paper.

It is argued at considerable length that the agreement is unambiguous, looking at the words thereof only, and that there is no room for operation of rules for construction. It seems to be thought that, unless ambiguity can be discovered in the language of the paper, looking at that only, it must, regardless of circumstances, be taken in its literal sense as expressing what the parties agreed to. There is no such rule, though it may be there is room for one to be misled in respect to the matter as he reads the numerous discussions found in

the books on the subject, unless he carefully notes differences in situations treated.

The very familiar rule is often stated and applied that oral testimony is not admissible to contradict or vary a written contract. It is perfectly consistent with that other rule, likewise often stated and applied, that oral testimony is admissible for the purpose of applying the contract to the subject with which it deals, and, in case of ambiguity then appearing, to establish the facts and circumstances under which the agreement was made in order that the language thereof may be read in the light of the environment at the time the parties chose such language to express their intention.

It is said that, when the language of a contract is plain, it is not open to construction. That is true in the general sense, but, unless viewed broadly, it does not convey accurately the full scope of the field where rules for construction are applicable. The words of a contract, in themselves, may be plain, yet when applied to the situation with which it deals, not plain, the literal sense leading to such unreasonableness as to suggest that the parties probably did not so intend. In so applying the contract oral testimony is generally necessary and permissible to the end that the full scope of the situation dealt with may be observed. As to when the language of a contract, in its literal sense, is to be taken as expressing the intention of the parties, is correctly indicated by Vattel's rule which has been often cited by this and other courts: "When the meaning is evident, *and leads to no absurd conclusions,* there can be no reason for refusing to admit the meaning which the words naturally present." Note the language "when the meaning is evident." The meaning is not evident when, if looking at the subject matter, it is so unreasonable as to appear unlikely that the parties so intended. To enable one to read the contract in the light of the subject matter and the effects and consequences, obviously evidence of facts and circumstances, not mere conversations, leading up to and

concurrent with the making of the contract, is often necessary. One of the elementary rules found in 1 Greenl. Ev. (15th ed.) § 286, and often cited by this and other courts, covers this subject. It is phrased thus:

"As it is a leading rule, in regard to written instruments, that they are to be interpreted according to their subject matter, it is obvious that parol or verbal testimony must be resorted to, in order to ascertain the *nature and qualities of the subject,* to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive if considered in the abstract."

In view of the elementary rule stated this court has said many times—and in perfect harmony with the idea that contracts which are plain are not open to construction, and in harmony with the idea that parol evidence is not admissible to contradict or vary a written contract, and in like harmony with the idea that mere conversations between parties respecting the contract leading up to and inclusive of the making thereof, are not admissible either to vary or explain it; *Steele v. Schricker,* 55 Wis. 134, 143, 12 N. W. 396,—ambiguity calling for construction may as well appear from language clear in itself, but leading to some absurd result when applied literally to the situation with which it deals, as from uncertainty of meaning upon its face. *Corbett v. Joannes,* 125 Wis. 370, 104 N. W. 69. When it is said,—where there is ambiguity in a contract, either in its literal sense, or when it is applied to the subject thereof, evidence of the circumstances under which the contract was made is proper to enable the court, in the light thereof, to read the instrument in the sense the parties intended, if that can be

done without violence to the rules of language or of law, as in *Johnson v. Pugh,* 110 Wis. 167, 170, 85 N. W. 641, and, in effect, in many other cases decided by this court, and in *Nash v. Towne,* 5 Wall. 689; *Merriam v. U. S.* 107 U. S. 437, 2 Sup. Ct. 536, and many of the federal cases, and likewise in the books quite generally,—we see only the logical application of the rule that "when a contract is plain *and leads to no absurd consequences,* it must speak for itself, but when otherwise, *it may speak in the light of the circumstances under which it was made.* Evidence of such circumstances is in no sense, under such rule, received to contradict or vary the contract, but rather to enable the court to say what the language of the agreement means according to the intention of the parties. In that respect such language cannot be twisted out of its ordinary meaning to the extent of going beyond the reasonable scope of the words. The meaning, in the ultimate, must be found in the language the parties used. To that extent their intention can be effectuated however much the literal or plain ordinary sense of the words may be departed from.

True, the distinction sometimes is so shadowy between application of the rule, that "oral conversations had between the parties to a written contract" before and at the time of the making thereof "cannot be received as explanatory of the writing," and the rule that the contract may be applied to its subject matter by oral evidence, as in *Nilson v. Morse,* 52 Wis. 240, 9 N. W. 1, and many other cases, and any ambiguity thus disclosed explained by resort to such evidence of the facts and circumstances characterizing the making of the agreement—that one is liable, at least without careful analysis, to think there is a conflict,—as in case of some term having been used in the contract, reasonably susceptible of either of two meanings, and proof was held proper to show,—by what the parties said when the agreement was made,—that they attributed thereto a particular meaning. *Ganson v. Madi-*

gan, 15 Wis. 144; *Weber v. Illing,* 66 Wis. 79, 27 N. W. 834; *Wenger v. Marty,* 135 Wis. 408, 116 N. W. 7; *Burton v. Douglass,* 141 Wis. 110, 123 N. W. 631. But in each instance the fact that the parties contracted with reference to the particular meaning, was treated as a circumstance, within the rule that the circumstances characterizing the making of a contract may be shown to aid in construing it, that other rule being fully appreciated, that mere verbal communications respecting a contract had at the time of, or prior to the making thereof, are no such characterizing circumstances of such making as to render proof thereof proper for purposes of construction. It is believed that the ideas in mind in the numerous cases which might be referred to, making, in one view, seemingly two lines, as suggested in *Burton v. Douglass, supra,* substantially all harmonize.

The subject treated was reviewed at some length by this court in *Boden v. Maher,* 105 Wis. 539, 81 N. W. 661, and, thinking to minimize seeming difficulties in the application of rules for construction, the court said:

"Parol evidence to vary the terms of a written contract is one thing; such evidence to enable the court to see what the parties to a contract intended to express by the language adopted in making it, is quite another thing. The former is not permissible. . . . The latter is permissible and is often absolutely essential to show the real nature of the agreement. . . . Both rules are elementary and do not conflict in the slightest degree with each other. One prevents a written contract from being varied by parol evidence either in regard to what was said at the time it was made or prior thereto; the other aids in determining what the contract is when its language, either in its literal sense or as applied to the facts, is obscure. The one is a rule to preserve the contract as expressed in the writing; the other is a rule of construction to determine what the contract, as expressed, is, it being kept in mind that the mutual intention of the parties, so far as the same can be ascertained, governs within the reasonable meanings of the language they chose to express it; and that rules of

construction to discover it are not to be resorted to unless there is some ambiguity to be cleared up. A failure to keep in mind the wide distinction between varying a contract by parol evidence and resorting to such evidence in aid of its construction often leads to error."

We might well add to the foregoing, as a conclusion evolved from the logic of Vattel's rule, so often referred to, and the general application of it: Since a contract may be uncertain in the words themselves when applied to the subject matter thereof though not otherwise uncertain, parol evidence to aid in making such application is proper. Such evidence for that direct purpose is one thing, while evidence merely to create ambiguity is quite another. The former is admissible; the latter is not. That does not militate against the rule that if the legitimate effect of the application is to disclose ambiguity, it opens the door for construction, including in aid thereof, introduction of evidence of the circumstances characterizing the contract and in view of which it was made. Thus it is said: Courts may ignore the literal sense of words where there is no uncertainty of expression (in the words by themselves) to clear up obscurities and avoid absurd consequences. *State v. Railway Cos.* 128 Wis. 449, 108 N. W. 594. It is only where the words are "plain, both in themselves and when applied to the subject with which they deal," that they "must be taken according to their ordinary import," no other meaning being added thereto or taken therefrom. *Huber v. Martin,* 127 Wis. 412, 429, 105 N. W. 1031, 1135. Otherwise, "The contract may be read very different from its literal sense" "so long as its reasonable scope is not departed from, if necessary to give effect to what the minds of the parties really met upon. That does not involve any modification of the contract," but, as said in *Zimmer v. Settle,* 124 N. Y. 37, 42, 26 N. E. 341, "has relation to the application of the language used to the subject within the contemplation of the parties as represented by the situ-

ation then existing and the surrounding circumstances, which it may be assumed they then had in view."

Applying the foregoing to the contract in question, ambiguity is readily observed. The language: "To be shipped at once to," etc., "Via Ill. Cent. R. R.," by itself would indicate that shipments from the seller's loading point to the named destination were contemplated. But the situation dealt with by the writing, as disclosed by legitimate evidence, is that the Illinois Central Railroad did not reach the loading place at all, so the transit, necessarily, had to commence on the Chicago & Northwestern Railway, which, only, reached such loading place. Again, though not indicated in the statement of facts, the calls for shipments to various points "Via Ill. Cent. R. R." were associated with calls for shipments "Via Wabash R. R." and shipments "Via A., T. & S. F. R. R.," neither of which roads reached anywhere near the contemplated loading place, showing, quite clearly, that "via" any particular road, where such road did not reach the loading point, was not used in the literal sense. That situation could only be made to appear by evidence *aliunde* the writing. When disclosed, ambiguity in the contract appeared at once. So it became necessary to learn the meaning of the language in view of the situation.

If there were nothing suggesting ambiguity but the circumstance mentioned, "Via Ill. Cent. R. R." might mean by way of that railroad so far as practicable, and otherwise by way of the only road reaching the loading point, to wit, the Northwestern road. But the obscure words refer back to and are characterized by the opening words of the writing, "As per your conversation with Mr. Campbell to supply ice at the rate of thirty cents per ton," etc., "we herewith send you the following orders," etc. On the face the term "As per your conversation," etc., might refer to the mere price for the ice, suggesting that the whole conversation was embodied in the writing, or quite as well refer to stated condi-

tions in the conversation upon which ice would be furnished at thirty cents per ton, not incorporated in the writing. In that there is ambiguity solvable only by proof of what the conversation in fact related to, and if to conditions of the price being as stated, further proof of such condition. In that sense the subject matter of the conversation is a characterizing fact or circumstance, and the stipulated condition likewise. Such facts or circumstances being a part of the environment in which the parties acted, were subjects of proof by parol evidence, within the rule above stated, and consistent with the other rule that parol evidence of conversations between parties respecting the contract had at the time of the making thereof are not admissible. When such conversations result in some matter of fact with reference to which the contract is made, either as evidenced in the writing, as in this case, or by the use of some term of double meaning pursuant to an agreement as to the particular one in mind, as in *Burton v. Douglass,* 141 Wis. 110, 123 N. W. 631; *Ganson v. Madigan,* 15 Wis. 144, and similar cases, then, necessarily, evidence to prove the conversation as a fact is permissible, not to show the meaning of the contract directly, and not at all to vary or contradict, but to establish the fact or circumstance, in the light of which the contract was made. Here the parties, in the writing itself, made the conversation referred to and the condition, as the jury in effect found, upon which the ice would be furnished at thirty cents per ton, circumstances necessarily referable to in order to determine what meaning the language of the writing was intended by both parties to express.

It follows that errors assigned on the admission of evidence to prove the conversation referred to in the writing must be overruled. The evidence tended to show that, in such conversation, the price of thirty cents per ton was made on condition of the ice being forwarded out of Madison over the Chicago & Northwestern Railway, and that reference to such con-

versation was made to thereby make such condition a part of the contract, which it might well do without contradicting the term "Via Ill. Cent. R. R." or enlarging it beyond its reasonable scope and that of similar terms several times used in the paper.

The disputed questions of fact involved in construing the contract being found in respondent's favor, upon evidence which was competent, as we have seen, the conclusion which resulted in the judgment followed necessarily.

The treatment of this case has been quite general, since substantially all appellant's complaints turn on whether the contract is ambiguous, and whether ambiguity in an agreement calling for construction can be legitimately disclosed by applying the writing by aid of evidence *aliunde* to the situation with which it deals, when, looking at the particular vital words themselves, there is no ambiguity, and whether a conversation had prior to, or at the time of making the writing, may be so referred to therein as to make stipulations and conditions thereby made and in the light of which the writing was drawn, fall within the field of circumstances provable in aid of construction. We have been constrained, in the light of familiar principles, to resolve such propositions in respondent's favor.

By the Court.—The judgment is affirmed.

The following opinion was filed October 22, 1910:

Barnes, J. (*dissenting*). I desire to record my views on some matters treated in the opinion of the court, without indulging in any lengthy statement of the reasons therefor.

1. I think there was no ambiguity in the writing in so far as it related to the shipments involved in this suit. The Illinois Central Railroad extended from Madison to the points at which the ice was to be delivered. The plaintiff was directed to ship the ice from Madison to these points "via" that line

of road. Manifestly, he did not do so, but instead relied on the construction placed on the writing by the agent of a rival line of road. The mere fact that the word "via" was not advisedly used in connection with the shipment of other cars does not furnish a sufficient warrant for the conclusion that it was inadvisedly used in connection with the shipments in question.

2. If the writing stated definitely, as I think it did, that the shipments should be made over the Illinois Central from the point of origin to that of destination, the fact that it referred to a prior oral conversation would not admit of parol evidence to show a prior agreement was made to the effect that the shipment should be made in some other way. Where the subject of the oral conversation is definitely covered in the subsequent written agreement, reference to the fact that a verbal talk was had does not take the writing out of the rule and permit one of the parties to testify to an entirely different contract. Nearly all contracts are the result of verbal negotiations, and reference thereto is immaterial so long as it is apparent that it was not the intention of the parties that some part of the agreement should rest in parol.

3. It is said in the opinion:

"To enable one to read the contract in the light of the subject matter and the effects and consequences, obviously evidence of facts and circumstances, *not mere conversations,* leading up to and concurrent with the making of the contract, is often necessary."

If by this statement it is intended to state as a rule of law that prior conversations are not admissible to explain an ambiguity in a contract, I disagree with the proposition. The contrary rule was established in *Ganson v. Madigan,* 15 Wis. 144, which was approved by this court in *Burton v. Douglass,* 141 Wis. 110, 116, 123 N. W. 631, wherein a number of other cases approving of the rule in *Ganson v. Madigan* are approved. If the court means that such conversations cannot

be shown to import ambiguity into an otherwise unambiguous contract, I agree entirely with what is said.

4. The mere fact that a contract may appear unreasonable to this court in view of the things that have transpired since it was made, or even in view of the situation of the parties when it was made, is not in itself a sufficient reason for holding the contract to be ambiguous. People have the privilege to and as a matter of fact do frequently make foolish contracts.

5. The integrity of written contracts should be preserved. Writings embodying the agreements of parties and signed by them seldom lie. Living witnesses often do, particularly when it is to their interest to do so. It is charitable to say that perhaps frequently they are only mistaken.

6. I think it is unfortunate to extend the rule of *Johnson v. Pugh,* 110 Wis. 167, 170, 85 N. W. 641, and many other cases, as to when parol evidence is admissible to vary or even to explain a written contract, and, if I have a correct conception of what is decided in this case, many things are said which are not in harmony with that case.

7. Where a contract does not express the true agreement of parties, resort may be had to a court of equity to reform it in an appropriate proceeding brought for that purpose. I think the orderly proceeding of going into such a court for such a purpose should be continued instead of attempting reformation by importing ambiguity into a contract because it may appear unreasonable or even ridiculous, and then interpreting the contract as meaning something different from what its words plainly imply.

JANSEN and another, Appellants, vs. HUERTH and others, Respondents.

September 14—October 4, 1910.

Adverse possession: Evidence: Islands: Trespass: Injunction: Findings of fact: Appeal: Directing new trial.

1. Evidence offered to sustain a claim of adverse possession must be strictly construed under the presumption that the occupancy is in favor of the true owner.
2. In an action to enjoin trespasses upon an island in a navigable river, evidence that defendants had for years pastured their cattle on the island and that they and others had for years cut firewood therefrom in the belief that the ownership of the island was in the government and that none of the persons so using it had any interest in or title to the island, fails to show exclusive, continuous, or hostile possession as against the true owner, and fails, therefore, to show that defendants had acquired title by adverse possession.
3. It appearing that the evidence on the subject of adverse possession was fully presented, and that further trial of that issue is not required to determine the rights of the parties, such issue will not be reopened, athough a new trial be ordered by the supreme court on other issues raised by the pleadings.
4. In an action to enjoin trespasses upon land, in which defendants denied plaintiffs' ownership and alleged title in themselves by adverse possession, a finding by the trial court that "there is no evidence before the court from which it can be determined that either the plaintiffs or the defendants have any title, right, or interest in or to the premises upon which the alleged trespasses were committed" is not a compliance with sec. 2863, Stats. (1898), being in substance a legal conclusion as to the probative force of the evidence without a finding upon the ultimate facts at issue between the parties; and in the absence of a finding of such facts, the record in the case not being such that the supreme court can ascertain the facts and proceed to a final adjudication, a new trial is ordered.

APPEAL from a judgment of the circuit court for Sauk county: E. C. HIGBEE, Judge. *Reversed.*

For the appellants there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

For the respondents there was a brief by *Bentley & Kelley*, and oral argument by *J. H. Hill.*

Siebecker, J. The plaintiffs are owners of lots 3 and 4 in section 14, town 9 north, range 6 east. They bring this action asking that the defendants be enjoined from trespassing upon that part of an island in the Wisconsin river to which they claim ownership and for damages for the trespasses alleged to have been heretofore committed by the defendants in removing a fence built by the plaintiffs upon the portion of the island claimed by the plaintiffs. The land in controversy is located on the river bed of the Wisconsin river between Sauk and Dane counties. The island is about a mile in length and about half a mile in width.

The evidence before the court tends to show that the defendants and others have for years pastured their cattle upon the island, access to the island by the cattle being from lands lying west of the plaintiffs' lands and east of the lands owned by the defendants. For years the defendants and others have cut firewood from the island, in the belief that the ownership of the island was vested in the government and that none of the persons so using it had any interest in or title to the island. The field-notes of a survey of the lands north of the river and covering the plaintiffs' lands were offered in evidence, but without any accompanying proof of the actual location of the lines and courses embraced therein. There was no evidence by a survey or otherwise locating the south river bank opposite the north bank, of which plaintiffs are alleged to be the owners. There was evidence before the court tending to show that the main channel of the river now flows south of the island, but the evidence as to its former condition and location is vague and meager. It is claimed that the island is an unsurveyed one, yet it seems to be assumed by the parties that a portion of it embraces an island surveyed in the original government survey. The court

found that the defendants' claim of title by adverse possession was not sustained, but still dismissed the complaint. We are not definitely informed upon what ground the court so turned the plaintiffs out of court.

At the conclusion of the evidence the court held that it failed to show that the defendants had acquired title to the portion of the island in dispute by adverse possession. This conclusion of the trial court is sustained by the record, for it is clear that the defendants were not in continuous, open, and hostile possession of this land as against the true owner so as to acquire title thereto by adverse possession. The evidence of such possession of defendants must be strictly construed under the presumption that the occupancy is in favor of the true owner. The facts and circumstances as to adverse possession fail to establish that the defendants occupied the land either exclusively, continuously, or in a hostile manner, and therefore do not overcome the presumption in favor of the true owner. We are persuaded that the evidence on this subject was fully presented to the court and that further trial of this issue is not required to determine the rights of the parties arising therefrom. As to this issue it must be held that the defendants have acquired no rights by adverse possession to any portion of the island.

But as to the other issues raised by the pleadings, and the disputed questions and rights arising thereon between the parties to this litigation, the record is most ambiguous, uncertain, and defective. It discloses that the plaintiffs' rights are dependent upon whether or not they owned the lands described in the complaint, whether in fact the portion of the north bank of the Wisconsin river which they claimed to own was within the government description contained in their conveyances so that they thereby acquired title as riparian owners in the bed of the river to the center of the stream, and what portion, if any, of the island involved in this controversy they owned as such riparian proprietors. To determine these

alleged rights of the parties under these issues it was necessary that the trial court ascertain as facts the actual location of the plaintiffs' lands; whether they embraced the north river bank, as claimed by them; the location of the opposite south river bank; the width of the river between such banks, and the location of the line of the center of the stream upon this island, so as to ascertain what portion of the island in question, if any, is located on the river bed the plaintiffs may be found to own. It is also necessary to determine whether this island includes within its area an original surveyed island, and if so whether any or all of the present area of the island has been formed by accretion to such surveyed island.

We find that the evidence offered by the parties fails to cover some of these questions and that the court omitted to make findings of fact from the evidence that was presented. This state of the case leaves the trial and determination of the rights of the parties so incomplete and uncertain that this court cannot ascertain the facts of the case, nor is it sufficiently advised by the record of the actual state of the case upon the controversies between the parties so as to be able to proceed to a final adjudication thereof. We are constrained to call the attention of the trial court and counsel to the case of *Young v. Miner,* 141 Wis. 501, 124 N. W. 660, and the cases there collected, respecting the requirements of conforming to the provisions of sec. 2863, Stats. (1898), regarding the necessity of having the issues of fact determined by appropriate findings of the trial court in cases tried by the court. We find this statement by the court in the record:

"That there is no evidence before the court from which it can be determined that either the plaintiffs or the defendants have any title, right, or interest in or to the premises upon which the alleged trespasses were committed."

The court therefore dismissed the complaint. This is not a compliance with the statute heretofore cited. It is in substance a legal conclusion as to the probative force of the evi-

dence without a finding upon the ultimate facts at issue between the parties in the light of the evidence. We are not informed as to what the facts of the case are so far as the evidence went. In view of this state of the case a new trial must be directed of all the issues except the issue raised upon the defendants' claim of title to the island by adverse possession, which we find was fully litigated and properly determined against the defendants.

In the light of the situation presented by the record we are of the opinion that justice and the interests of the parties will be promoted by ordering a new trial upon all the other issues. If the parties discover additional evidence material to the issues to be retried they shall have the right to produce it, and the court may then make findings of fact in writing as to the issuable facts upon all the evidence submitted in the case and make its decision thereon in conformity to the statutes and the cases above referred to.

By the Court.—Judgment reversed, and the cause remanded for retrial as indicated in the foregoing opinion.

RUHLAND, Appellant, vs. COLE, Respondent.
SAME, Respondent, vs. SAME, Appellant.

September 15—October 4, 1910.

Libel: Newspapers: Discussion of public matters: Charges of criminal conduct: Intimidation of witnesses in proceeding to revoke liquor license.

1. Words published in a newspaper concerning the appearance of plaintiff (a brewer) before a city council to oppose the revocation of the liquor license of a third person, in which it was suggested, among other things, that plaintiff was interested in the matter contrary to "the law that brewers cannot take out a license to run a saloon," and that the brewing company dominated the council on that occasion and was "bigger than the en-

tire city government," and which also stated that John Barleycorn was "bigger than the entire city government," are *held* not libelous.

2. A statement in such publication with reference to the proceeding before the council that "the wheels of government stopped to oil up again for another session of the trial," is *held* not capable of the meaning ascribed thereto by innuendo that plaintiff had corruptly influenced members of the council.
3. In libel the alleged defamatory words must be capable of the meaning ascribed to them by the innuendo.
4. Editors or publishers in their newspapers may take part in the discussion or debate of public matters with the same freedom as other citizens.
5. In newspaper publications concerning matters of public interest, untruthful accusations of crime or untruthful insinuations of criminal conduct, or untruthful or scandalous or defamatory expressions tending to subject the person written of to public ridicule, hatred, or contempt, are libelous.
6. To procure a warrant to be issued against a person who is a witness in a proceeding before a city council to revoke a retail liquor dealer's license, for the purpose of intimidating that witness in giving his testimony in such proceeding, is a misdemeanor at common law.
7. A publication falsely charging one with having caused warrants to be issued for persons summoned as witnesses in a proceeding for the revocation of a retail liquor dealer's license with the intent to intimidate such witnesses and so deter them from testifying, is libelous.

Appeals from an order of the circuit court for Sauk county: E. Ray Stevens, Circuit Judge. *Affirmed in part; reversed in part.*

Cross-appeals from an order sustaining a demurrer for insufficiency to the first and second causes of action and overruling a like demurrer to the third and fourth causes of action contained in a complaint for libel.

The cause was submitted for the plaintiff on the briefs of *Grotophorst, Evans & Thomas,* and for the defendant on the briefs of *Bentley, Kelley & Hill.*

Among other references upon the part of the plaintiff were the following: *Scofield v. Milwaukee F. P. Co.* 126 Wis. 81,

105 N. W. 227; *Pfister v. Sentinel Co.* 108 Wis. 572, 84 N. W. 887; *Moley v. Barager,* 77 Wis. 43, 45 N. W. 1082; *Muetze v. Tuteur,* 77 Wis. 236, 46 N. W. 123; *Monson v. Lathrop,* 96 Wis. 386, 71 N. W. 596; *Buckstaff v. Viall,* 84 Wis. 129, 54 N. W. 111; *Hamlin v. Fantl,* 118 Wis. 594, 95 N. W. 955; *Dabold v. Chronicle P. Co.* 107 Wis. 357, 83 N. W. 639; *Robertson v. Edelstein,* 104 Wis. 440, 80 N. W. 724; *Elmergreen v. Horn,* 115 Wis. 385, 91 N. W. 973; *Benedix v. German Ins. Co.* 78 Wis. 77, 47 N. W. 176; *Werner v. Ascher,* 86 Wis. 349, 56 N. W. 869.

Among other references cited upon the part of defendant were the following: *Smith v. Utley,* 92 Wis. 133, 65 N. W. 744; *Filber v. Dautermann,* 28 Wis. 134; *Egan v. Semrad,* 113 Wis. 84, 88 N. W. 906; *Kraus v. Sentinel Co.* 60 Wis. 425, 19 N. W. 384; *Cramer v. Noonan,* 4 Wis. 231; *Platto v. Geilfuss,* 47 Wis. 491, 2 N. W. 1135; *Gillan v. State Journal P. Co.* 96 Wis. 460, 71 N. W. 892; *Solverson v. Peterson,* 64 Wis. 198, 25 N. W. 14; *Massuere v. Dickens,* 70 Wis. 83, 35 N. W. 349; *Docter v. Riedel,* 96 Wis. 158, 71 N. W. 119; *Birdsall v. Birdsall,* 52 Wis. 208, 8 N. W. 822; *Benz v. Wiedenhoeft,* 83 Wis. 397, 53 N. W. 686; *Pandow v. Eichsted,* 90 Wis. 298, 63 N. W. 284; *Clute v. Clute,* 101 Wis. 137, 76 N. W. 1114.

TIMLIN, J. Matter of inducement contained in the first five paragraphs of the complaint and made applicable to each count averred that plaintiff was a resident of Baraboo engaged in conducting a brewery, and the defendant a resident of the same city engaged in the publication of a daily newspaper called the Evening News, having a large circulation, etc. Plaintiff had been an alderman of Baraboo, is a member of the board of supervisors for Sauk county, and enjoys a good reputation. The Ruhland Brewing Company is a Wisconsin corporation, of which plaintiff is secretary and treasurer and owns all the stock and alone controls the af-

fairs and general business thereof. Plaintiff's sister owns a building in Baraboo occupied by one John Harris as lessee, who conducts a retail liquor business therein. About February 1, 1910, a proceeding was commenced before the common council of Baraboo to revoke the liquor license of this Harris because of alleged illegal sales of intoxicating liquor by him at his said place of business to certain minors, and this proceeding was pending before the common council on February 24, 1910. The plaintiff was present at the meeting of the common council on that evening and Harris appeared, denied the charge, and the proceeding to revoke his license was adjourned until February 28, 1910.

Following this the first cause of action attempted to be set forth avers that on February 25, 1910, the defendant in his said newspaper wrote, printed, and published of and concerning the plaintiff the following false, libelous, and defamatory matter in an article entitled: "Just a Few Questions," to wit:

"There is a law that brewers cannot take out a license to run a saloon. Why is the Ruhland Brewing Company so interested in the Harris case? Who owns the saloon? Looks queer, doesn't it? What right had *Charles Ruhland* to speak at the council meeting? *Charles Ruhland* was once an alderman and is now a member of the Sauk county board of supervisors. The average citizen would suppose that he believed in protecting the peace and dignity of the state. He undoubtedly thinks John Harris guilty, else he would not cause warrants to be issued against the minors. What do you think of that?"

This is followed by an innuendo reciting that by this statement was meant that plaintiff had violated the laws of the state of Wisconsin relative to liquor licenses, etc., and that this defamatory matter so written, composed, printed, published, and circulated by the defendant brought the plaintiff into social disgrace, public distrust, hatred, ridicule, and con-

tempt, and was so understood by divers persons, to the damage of the plaintiff.

The second separate cause of action charges in the same form the publication on the same day of the following:

"What kind of sand are those aldermen standing on who first voted to go on with the case and then after receiving a Shakespearian pound of flesh broadside from the John Barleycorn attorney, decided to continue the matter. If the city council permits a brewing company to come in and run the business for them, why not invite Cannon, Aldrich, and the Steel trust. Is the council controlling John Barleycorn or is John Barleycorn boss of the council?"

Also another like publication in the same paper of an article entitled: "A Splendid Farce at City Council," with a headline as follows: "The Ruhland Brewing Company bigger than the entire city government." Also under this headline: "John Barleycorn is bigger than the entire city government." By innuendo this is charged to mean that the plaintiff is the personification of malt liquor and a drunken, contemptible sot, and to liken him to that worthless, drunken, lawless, and detestable character ordinarily called in popular parlance John Barleycorn, to plaintiff's damage.

The demurrer to the foregoing counts was properly sustained. The published matter charges no crime against the plaintiff. The hearing before the common council was for the purpose of examining and deciding the question of revocation of the license and in this proceeding the public is interested. It cannot be said that because the plaintiff was a brewer and could not by law take out a license to run a saloon, but nevertheless was interested in the case, opposed the revocation of the license, and spoke at the council meeting, or caused warrants to be issued against minors, that the publication of such matters would tend to subject the plaintiff to public distrust, hatred, ridicule, or contempt. The publication set forth in these two counts does not go beyond the or-

dinary limits of argument. It is suggested by interrogation that the plaintiff was not impartial, that he had no right to speak at the meeting, that his conduct seemed strange, and that he no doubt believed Harris guilty of selling liquor to minors. The second count refers more particularly to a lack of fairness on the part of the aldermen who first voted to go on with the case and then, after hearing the argument of the attorney opposed, decided to continue the matter. This argument is ambiguously and eloquently described as "A Shakespearian pound of flesh broadside," and the lawyer is referred to as "the John Barleycorn attorney." This last does not relate to or concern the plaintiff. The defendant wishes to know whether the council is controlling John Barleycorn or John Barleycorn is boss of the council. We must assume that this proper name is used in the usual manner as a personification of intoxicating liquor and is not intended to designate the plaintiff. The remaining expressions, "The Ruhland Brewing Company bigger than the entire city government," contained in the headline, and the words in the body of the article, "John Barleycorn is bigger than the entire city government," we are convinced are not libelous. It is neither criminal nor contemptible to be big or to exceed in size the city government. "Bigger," as it is here used, means more powerful. But it suggests no improper acquisition or exercise of power. Editors or publishers of newspapers may in the columns of their papers argue in opposition to or in advocacy of any public measure like other citizens, and in doing so they are not confined within narrow limits, but outside of the restrictions of the libel law the whole compass of eloquence, imagery, and logic is available to them. They may enter the lists of debate armed with all the weapons in the arsenal of logic, embellished with all the ornaments in the gallery of rhetoric. As was humorously but not inaccurately said in *Berry v. Georgia,* 10 Ga. 511, 523:

"Here, under the fullest inspiration of excited genius, they may give vent to their glowing conceptions, in thoughts that

breathe and words that burn. Nay more, giving reins to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time—*extra flammantia mœnia mundi.*"

In this illimitable field for the exercise of their talents they have only to avoid untruthful accusations of crime or untruthful insinuations of criminal conduct and such untruthful, scandalous, and defamatory expressions as would subject the person written of to public ridicule, hatred, or contempt.

The third cause of action sets forth the same words that appear in the second cause of action and in addition the following:

"Everybody in town expected that the license would be revoked, even the saloonkeepers themselves said so. Then why did the council make a farce of the whole matter?"

Also the following:

"A Splendid Farce at City Council—Much Wrangling of Lawyers and General Confusion—Only One Witness was Examined—The Ruhland Brewing Company bigger than the entire city government. John Barleycorn is bigger than the entire city government. That has been the opinion of many for several years and it was most emphatically expressed at the city council meeting on Thursday night. During the examination of the first witness in the John Harris case, the Ruhland Brewing Company put down its foot, there was much wrangling of lawyers, the members of the council were threatened and the wheels of government stopped to oil up again for another session of the trial. After the regular business had been transacted Mayor Hull called the Harris case, the question being the revoking of his license on the complaint of selling to minors. Alderman Altpeter made the first move on the checkerboard by asking if the complainant, S. W. Kenyon, had furnished a bond to cover costs. While Mayor Hull and City Attorney John M. Kelley held a little conference, Alderman Risley told the council that Alderman Altpeter was out of order, because, if a bond was desired, it should have been asked before the summons was issued. City Attorney Kelley then read the law and said that the bond for the costs should have been asked before the summons was

issued. Alderman Altpeter thought it strange that a bond had not been exacted. Alderman Welk replied that the council had not asked anything of the kind and that it was not to be expected. Alderman Jacobs said that it had not been asked and supposed that it was not requested. Alderman Thuerer then asked if it would be proper to go on with the case, and when assured that it would moved to proceed. It was seconded by Alderman Altpeter and carried by unanimous vote, all of the aldermen being present. . . . Only a small part of what was said and done is here given. It is impossible to narrate all of the threats, abuse, and insinuations that were handed out. All in all it was a grand farce. The council permitted the attorney for the Brewing Company to come in and stay the whole proceeding when the attorney himself acknowledged that he did not represent Harris. It was the same old farce as before. For one night the Brewing Company was bigger than the city council."

This is followed by an innuendo to the effect that it was meant thereby that the plaintiff had unlawfully bribed, corrupted, and improperly influenced members of the common council, etc.

We cannot agree with the learned circuit judge that there is anything to libel the plaintiff in this publication, much less that it insinuates or means that the plaintiff had unlawfully bribed, corrupted, or improperly influenced the members of the common council. There is the suggestion that the brewing company, and through it the plaintiff, had great influence on the common council or dominated the common council on the occasion in question, but not by improper or unlawful means. It is suggested that the statement that "wheels of government stopped to oil up again for another session of the trial" contained some insinuation of corrupt dealing, but judging from the context above and the words themselves this does not appear plausible. We do not think these words are capable of the meaning sought to be given to them by the innuendo. The writer probably referred to drinking of intoxicating liquors by the officers during the adjournment. So

far as the third count is concerned the demurrer should have been sustained.

The fourth count avers the publication at the same time in the same manner of the following:

"A Splendid Farce at City Council." "Mr. Kenyon then said he understood there were warrants in the room to arrest all the boys in the case. (He was partly right, *Charles Ruhland* had caused warrants to be issued for part of the boys, no doubt to frighten them.) . . . If the Ruhland Brewing Company desired to know the evidence, why has *Charles Ruhland* sworn out warrants for several of the minors? . . . *Charles Ruhland* was once an alderman and is now a member of the Sauk county board of supervisors. The average citizen would suppose that he believed in protecting the peace and dignity of the state. He undoubtedly thinks John Harris guilty else he would not cause warrants to be issued against the minors. What do you think of that?"

"Meaning thereby that this plaintiff, knowing said Harris was guilty of the offense of selling liquor to minors in violation of law, had abused the process of a criminal court of the state of Wisconsin for the purpose of intimidating said minors to prevent them or any of them from testifying in the proceedings before the council to revoke the license of said John Harris as a retail liquor dealer, and that plaintiff was guilty of obstructing public justice, and meaning the plaintiff so abused the process of a criminal court of this state without cause, justification, or excuse, and that the said minors were guilty of no offense whatever and the action of plaintiff was groundless and malicious, and that he had in fact warrants to issue to suppress the testimony of said minors and to aid the said Harris in evading the laws of Wisconsin and to assist him in defeating public justice in said proceeding to revoke the Harris license, and by such false, libelous, and defamatory matter brought the plaintiff into social disgrace, public distrust, hatred, ridicule, and contempt, and the matter so published and circulated by defendant was so understood by

divers persons who read the same both within and without the state of Wisconsin," to the injury of plaintiff, etc.

The matter here charged is libelous.

"The doing of any act tending to obstruct the due course of public justice has always been held indictable as a misdemeanor at common law. Bribing, intimidating, or persuading a witness not to testify, or not to attend court, are each among the readiest and the most corrupting of this class of misdemeanors." *State v. Keyes,* 8 Vt. 57, 67, 30 Am. Dec. 450; *State v. Baller,* 26 W. Va. 90, 53 Am. Rep. 66; 10 Am. & Eng. Ency. of Law (2d ed.) 1041 and authorities in note.

This rule of the common law was announced originally with reference to intimidating or bribing witnesses called or to be called by the state in a criminal prosecution. But it was the public nature of the prosecution and not the nature of the act prosecuted that gave rise to the rule, and the rule has been extended in England to special proceedings relating to the collection of revenue. *State v. Keyes, supra.* The proceeding for revocation of license before a city council is a proceeding in which the public is interested, and the intimidation of witnesses called or to be called in behalf of the public, under the common-law rule above quoted, applied to present conditions, is a misdemeanor. Charging the plaintiff with such conduct does also tend to subject him to public hatred or contempt. What offense was charged against the minors is not stated, but there is a suggestion that no offense was committed by them and that the warrants were issued for an improper purpose.

The order of the circuit court is therefore affirmed in sustaining the demurrer to the first and second counts of the complaint, reversed in overruling the demurrer to the third count of the complaint, and affirmed in overruling the demurrer to the fourth count of the complaint. The plaintiff as appellant has submitted a printed case and brief on his appeal and a brief as respondent on defendant's appeal. The defendant as

appellant has submitted a printed case and brief and a brief as respondent on plaintiff's appeal. The plaintiff should pay the clerk's fees. No other costs to be taxed in this court.

By the Court.—It is so ordered.

SENTINEL COMPANY, Respondent, vs. SMITH, Appellant.

September 15—October 4, 1910.

Guaranty: Acceptance: Construction: Limited or continuing? Pleading: Notice of default: Giving credit after default: Discharge of guarantor.

1. In an action upon a contract of guaranty a complaint alleging that the plaintiff did "notify the defendant that the said plaintiff accepted the said guarantee and relied thereon," sufficiently alleges acceptance of and reliance on the guaranty.
2. A contract between a newspaper publishing company and an agent provided that it should continue for at least six months and that the agent should promptly pay every month for the papers sent him. By a contract of guaranty executed the same day, defendant agreed "to become responsible for the prompt payment of all bills for such papers to the amount of $500." *Held*, that the guaranty was not limited to payment for the first $500 worth of papers delivered, but was a continuing guaranty, binding defendant to pay for such papers as might be delivered during the life of the contract, not exceeding the sum named.
3. In an action upon such guaranty the complaint need not allege that notices of the various defaults of such agent were given to defendant from time to time as they occurred. If notice was required, failure to give it was defensive matter to be set up in the answer.
4. The mere fact that the creditor continued to ship papers to the agent, notwithstanding he was in default in his payments after the first month, did not evince either bad faith or reckless conduct on the part of the creditor such as would bar a recovery against the guarantor.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

On February 25, 1908, plaintiff entered into a contract with one E. E. Hull, by the terms of which said Hull was appointed agent and solicitor of the Milwaukee Sentinel at Madison, Wisconsin. The contract provided that it should continue at least six months and that the agent should promptly pay every month for the papers sent him, at the specified price. This action is brought to recover $468.80 on an alleged contract of guaranty signed by the defendant, the material portion of which is as follows:

"To the Milwaukee Sentinel, Feb. 25, 1908.
"Milwaukee, Wis.

"You are hereby authorized to furnish E. E. Hull of Madison, Wis., with copies of the Milwaukee Sentinel for sale, the undersigned hereby agreeing to become responsible to you for the prompt payment of all bills for such papers to the amount of $500.00."

The complaint alleged acceptance of the guaranty and reliance thereon by the plaintiff. It further alleged that on and between March 1 and September 1, 1908, said Hull received newspapers from the plaintiff to the amount and value of over $1,300, and that various payments had been made thereon, so that the balance due was that claimed in the complaint. From an order overruling a general demurrer to the complaint defendant appeals.

J. Burritt Smith, for the appellant.

For the respondent there was a brief by *Olin & Butler,* and oral argument by *W. R. Curkeet.*

Barnes, J. This court is asked to reverse the order of the circuit court on the following grounds:

(1) Because the complaint fails to allege that the plaintiff accepted and relied on the defendant's guaranty.

(2) Because the guaranty was limited to $500, and all liability thereunder ceased when the agent, Hull, had paid for the first $500 worth of papers delivered to him under his contract.

(3) Because prompt notice of default on the part of the agent was not given to the guarantor; and

(4) Because plaintiff continued to extend credit to the agent after he had defaulted in making payments that were due.

1. The first objection is untenable. The complaint alleges that the plaintiff, "by its duly authorized agent, did on said 25th day of February, 1908, and after the execution of said agreement, notify the said defendant that the said plaintiff accepted the said guarantee and relied thereon." This is a sufficient allegation of acceptance of and reliance on the guaranty. *Travelers Ins. Co. v. Hallauer,* 131 Wis. 371, 111 N. W. 527; *White v. Reed,* 15 Conn. 457.

2. In construing contracts of guaranty as in construing other contracts, the important question is, What did the parties intend? Both of the parties to this contract concede that the two instruments should be read together. The contract between the plaintiff and the agent, Hull, clearly contemplated that the latter should be supplied with papers for a period of at least six months. Considering the situation of the parties and the language of the guaranty, we think it was intended that the defendant should become responsible for such papers as plaintiff might deliver to its agent during the life of the contract, the liability in no event to exceed the sum of $500. In other words, we hold that the guaranty is a continuing one. A contract precisely similar in terms was so construed by the Michigan court. *Detroit Free Press v. Pattengill,* 155 Mich. 272, 118 N. W. 927. And while there are some decisions to the contrary, the decided weight of authority is to the effect that such a guaranty should be construed as being a continuing rather than a limited one. *Gates v. McKee,* 13 N. Y. 232; *Rindge v. Judson,* 24 N. Y. 64; *Mathews v. Phelps,* 61 Mich. 327, 28 N. W. 108; *Lane v. Mayer,* 15 Ind. App. 382, 44 N. E. 73; *Nat. Bank v. Thomas,* 220 Pa. St. 360, 69 Atl. 813; *Paskusz v. Bodner,* 75 N. J. Law, 447, 67

Atl. 1040; *Fisk v. Rickel,* 108 Iowa, 370, 79 N. W. 120; *Taussig v. Reid,* 145 Ill. 488, 32 N. E. 918.

3. It was not incumbent upon plaintiff to allege that notices of the various defaults of the principal debtor were given to the defendant from time to time as they occurred. If the question of notice was material at all, failure to give it is defensive matter that must be pleaded by way of answer. *Mamerow v. Nat. L. Co.* 206 Ill. 626, 69 N. E. 504; *Swisher v. Deering,* 204 Ill. 203, 68 N. E. 517, 518; *Furst & B. Mfg. Co. v. Black,* 111 Ind. 308, 12 N. E. 504, 508; *Davis v. Wells,* 104 U. S. 159; 20 Cyc. 1465, and cases cited in note 74. Under the facts stated in the complaint it is, to say the least, doubtful if plaintiff was obliged to give notice to defendant of the successive defaults. *Loverin & B. Co. v. Travis,* 135 Wis. 322, 326, 115 N. W. 829. In any event, all the law requires is that the notice be given within a reasonable time. See cases cited *supra.* This court could not say as a matter of law that the time which elapsed in the instant case was unreasonable. We are not informed as to how long the time was.

4. Lastly it is urged that inasmuch as the agent, Hull, was behind in his payments from and after the first month he operated under his contract, the plaintiff was guilty of bad faith and reckless conduct in continuing shipments during the life of the contract, and therefore it cannot recover. The mere indulgence of the creditor in such a case will not discharge the surety. "Beyond the bare neglect of the creditor to enforce payment or performance from the principal, there must be some act of connivance or gross negligence amounting to wilful shutting of the eyes to the fraud." *McKechnie v. Ward,* 58 N. Y. 541, 549, and cases cited; *Monroe Co. v. Otis,* 62 N. Y. 88, 94; *Howe M. Co. v. Farrington,* 82 N. Y. 121, 128; *Douglass v. Ferris,* 138 N. Y. 192, 206, 33 N. E. 1041; *Benjamin v. Hillard,* 23 How. 149, 165, 166; *Grafton*

v. Hinkley, 111 Wis. 46, 57, 86 N. W. 859; *Hubbard v. Haley,* 96 Wis. 578, 589, 71 N. W. 1036; *Watertown F. Ins. Co. v. Simmons,* 131 Mass. 85.

By the Court.—Order affirmed.

ALLEN, Respondent, vs. CENTRAL WISCONSIN TRUST COMPANY, Trustee in Bankruptcy, Appellant.
SAME, Appellant, vs. SAME, Respondent.

September 15—October 4, 1910.

Bankruptcy: Exemptions: Life insurance policy payable to wife: Right to change beneficiary: Dividends.

1. A policy of insurance upon the life of the husband, from which the investment feature has been eliminated by the payment of the surplus to the insured at the end of the tontine period, and which remains strictly a paid-up policy of life insurance payable to the wife, is exempt from the claims of the creditors of the husband and does not pass to his trustee in bankruptcy; nor does the right or power to change the beneficiary, reserved by the terms of the policy to the insured, pass to such trustee.

[2. Whether the wife, as beneficiary in such a policy, has the sole, absolute, and indefeasible title thereto, under sec. 2347, Stats. (1898), notwithstanding the reservation in the policy of the right of the insured to change the beneficiary, is not determined.]

3. Assuming that in such a case the insured husband has the right to change the beneficiary, his exercise of that right after he has been adjudged a bankrupt would not convert the policy into property which would then pass to the trustee, it having been exempt at the time of such adjudication.

4. The fact that such a paid-up policy shares in annual dividends, the amount of which is likely to vary from year to year, does not destroy its essential character as a purely life insurance contract, the dividend being a mere incident of the policy, the right to receive which is in the beneficiary.

APPEALS from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action of replevin to recover a policy of insurance issued by the Northwestern Mutual Life Insurance Company of Milwaukee upon the life of Philip Allen, Jr., February 21, 1888, for the sum of $2,000. The policy provided for the payment of an annual premium of $118.34 for ten years. At the end of twenty years, and prior to the time plaintiff was made the beneficiary, the insured exercised an option to withdraw in cash the accumulated surplus, then amounting to $705.31, apportioned by the company to this policy, and it was then continued as a fully paid-up life insurance policy for the sum of $2,000 and became entitled to annual dividends until all contributions to the surplus fund had been returned. The annual dividend for 1910 amounted to $11.40. The value of the policy at the time of the commencement of the action was $1,159.83.

From the time the policy was issued until February 23, 1908, it was payable to the executors, administrators, or assigns of Philip Allen, Jr. On that day, at the request of the insured, the plaintiff was made the beneficiary, and the following indorsement placed upon the policy by the company:

"Milwaukee, Wis., Feb. 27, 1908.

"At the request of the insured, dated February 23, 1908, *Edith L. Allen,* wife of the insured, is hereby made beneficiary in this policy, subject to the right of the insured to change beneficiary as provided on the second page of this policy. If no beneficiary survive the said insured, payment shall be made when due to the executors, administrators, or assigns of the said insured."

The second page of the policy contained this provision:

"The insured may, subject to the rights of any assignee, change the beneficiary or beneficiaries at any time during the continuance of this policy by filing with the company a written request accompanied by this policy; such change to take effect upon the indorsement of the same on the policy by the company."

On November 20, 1909, said Allen was adjudged a voluntary bankrupt, and thereafter the defendant was duly

elected the trustee of the bankrupt estate and is still acting as such trustee.

The trial court held that the policy did not pass to the *Central Wisconsin Trust Company* as trustee in bankruptcy of Philip Allen, Jr., as a part of the assets of said bankrupt, but that upon the death of said Philip Allen, Jr., if the same shall occur during the life of the plaintiff, the latter will be entitled to recover the insurance provided for in said policy. It further held that the *Central Wisconsin Trust Company,* as trustee, was entitled to recover the insurance provided for in said policy upon the death of said Philip Allen, Jr., if he shall die after the decease of *Edith L. Allen,* the plaintiff, and that said trustee in bankruptcy was also entitled to collect each year the annual dividends that shall be paid on said policy and is entitled to retain possession of said policy until the death of said Allen, and that in case the plaintiff shall still be living, the defendant is to deliver said policy to the plaintiff; and dismissed the complaint with costs.

The plaintiff appeals from that portion of the judgment which provides that the defendant will be entitled to recover the insurance provided in said policy upon the death of said Philip Allen, if he shall die after the decease of *Edith L. Allen,* the plaintiff, and from that portion of the judgment which adjudges that the defendant is entitled to collect the annual dividends which shall be paid on said policy, and from that portion of the judgment which adjudges that defendant is entitled to retain possession of said policy until the death of said Allen, and from the dismissal of the plaintiff's complaint. The defendant appeals from the judgment on the ground that the trial court should have decreed that the policy of insurance in question, as to the trustee in bankruptcy of Philip Allen, Jr., is a part of the assets in bankruptcy.

The cause was submitted for the plaintiff on the brief of *Rufus B. Smith,* and for the defendant on that of *Richmond, Jackman & Swansen.*

For the defendant it was contended, *inter alia*, that plaintiff is not the *assignee*, nor is the policy made *payable to her*, nor *made for her benefit*, within the meaning of sec. 2347, Stats. (1898). She had no vested interest as beneficiary, because the insured always retained the right to designate another beneficiary without her consent. 2 May, Ins. § 399 M; *Hopkins v. N. W. L. Assur. Co.* 99 Fed. 199; *Stoll v. Mut. Ben. L. Ins. Co.* 115 Wis. 558, 561; *In re Slingluff*, 106 Fed. 154; *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41; *Hopkins v. Hopkins' Adm'r*, 92 Ky. 324, 17 S. W. 864; *In re Orear*, 24 Am. Bankr. Rep. 343; Bankruptcy Act of July 1, 1898 (30 U. S. Stats. at Large, ch. 541), sec. 1 (25); 25 Cyc. 893, and cases in notes; *Hilliard v. Wis. L. Ins. Co.* 137 Wis. 208, 214.

Vinje, J. 1. Counsel for plaintiff contends that when the plaintiff became the beneficiary of the policy she thereby became vested with the sole, absolute, and indefeasible title thereto by virtue of the provisions of sec. 2347, Stats. (1898), notwithstanding the reservation in the policy of the right of the insured to change beneficiary at any time during the life of the policy. In the view the court has taken of this case it does not become necessary to decide that question, and it is expressly reserved for consideration and decision when the occasion therefor shall arise.

The policy, after the surplus was withdrawn at the end of the tontine period, and the wife made the beneficiary, was and remained strictly a life insurance policy payable to the wife of the insured. As such it was exempt from the claims of the creditors of the husband. Subd. 19, sec. 2982, Stats. (1898), and sec. 2347. Sec. 6 of the bankruptcy law (Act July 1, 1898, 30 U. S. Stats. at Large, ch. 541) adopts, for purposes of bankruptcy proceedings, the exemptions allowed by the laws of the several states. 1 Remington, Bankruptcy, sec. 1003; *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656. The

policy was, therefore, exempt from the creditors of the husband in the bankruptcy proceedings and did not pass to the trustee.

But it is claimed by counsel for defendant that, inasmuch as the insured reserved to himself the right or power to change the beneficiary, such right or power passed to the trustee, and the cases of *In re Welling*, 113 Fed. 189; *In re Holden*, 114 Fed. 650; *In re Hettling*, 175 Fed. 65; *In re Wolff*, 21 Am. Bankr. Rep. 452; *Matter of White*, 23 Am. Bankr. Rep. 90, and *In re Schofield*, 147 Fed. 862, are cited to sustain the claim. Reference to those cases will show that the policy in each of them was in the nature of an endowment policy, and provided for the payment to the insured, at the end of a stated period, of a fixed, definite sum, and it was held that the insured had property rights in the policy that passed to the trustee notwithstanding it was made payable to the wife in the event of her surviving the husband. We have no such case here. The investment feature of the policy in behalf of the insured was entirely eliminated when the surplus was paid him. Moreover, the bankruptcy act itself specifically declares that such a policy does not pass to the trustee. Sec. 70(a) of the bankruptcy law provides that the trustee of a bankrupt shall "be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, *except in so far as it is to property which is exempt*," and then specifies different classes of property that pass to the trustee. The federal courts have repeatedly held that the bankruptcy act does not affect ordinary life insurance policies payable to the wife of the bankrupt. In *In re Scheld*, 104 Fed. 870, 871, the court says:

"It will be seen that the clause of sec. 70 above quoted does not include policies of insurance payable to the wife, children, or other kin of the bankrupt, but is limited to policies the proceeds of which are payable to the bankrupt himself, his estate, or personal representatives. The enactment does not deprive

the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but it does prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same while seeking a discharge from their debts through the bankrupt act."

This language is quoted with approval in *In re Holden,* 114 Fed. 650, 52 C. C. A. 348.

It is further claimed that, inasmuch as the insured reserved the right to change the beneficiary, he may yet do so, and convert the policy into property that may pass to the trustee. Conceding, but not deciding, that he still has the right to change the beneficiary, and assuming that he may do so, yet it is not easy to perceive upon what ground it can be claimed that the trustee is at all concerned with what may afterward become of exempt property. The trustee is vested with the title to the property of the bankrupt, if at all, as of the date he was adjudged a bankrupt. At that time this policy was exempt and did not pass to the trustee. It cannot pass later, no matter what the bankrupt may do.

2. It may be said that, inasmuch as this paid-up policy shares in the annual dividends, it is not purely a life insurance policy. Its value at the time of the commencement of the action was $1,159.83 and the annual dividend for 1910 was $11.40. The amount of the dividend is likely to vary from year to year, depending upon interest rates and the cost of conducting the business. It is deemed, therefore, that the dividend is a mere incident of the policy and that it does not destroy its essential character as a purely life insurance contract. *Ellison v. Straw,* 119 Wis. 502, 508, 97 N. W. 68. The right to receive such dividend is in the beneficiary.

It follows from what has been said that the plaintiff is entitled to judgment awarding the possession of the policy to her.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with this opinion.

BARNES, J., took no part.

PEPLINSKI, Appellant, vs. NICHOLS, Respondent.

September 15—October 4, 1910.

Sales: Acceptance by vendor of rescission: Acts of ownership.

Acts of the vendor, after a machine had been returned to his possession by the vendee, in taking it to his own premises for the purpose of caring for it, or in offering a part of it in evidence to show that it was not defective, cannot be considered as acts of ownership which would amount to an acceptance of a rescission of the sale.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action to recover the purchase price of a horse rake sold by the plaintiff to the defendant February 7, 1907, the defense being rescission of the contract. The evidence showed the sale of a rake by the plaintiff to the defendant under a contract of warranty by which plaintiff warranted the rake to do good work, to be well made, of good material, and durable if used with proper care. It was further agreed that if upon one day's trial with proper care the rake failed to work, purchaser should immediately give notice to the plaintiff, stating wherein the machine failed, and should then allow reasonable time for a competent man to be sent to put it in good order, and render necessary and friendly assistance to operate it, and that if the machine could not then be made to work well, purchaser should immediately return it and the price should be refunded, which should constitute a settlement of the transaction; that use of the machine after one day or

in harvesting more than twelve acres, or failure to give written notice to the plaintiff, or failure to return the machine as specified, should constitute an acceptance of the machine in fulfilment of the warranty. The evidence further showed that the defendant used the rake in the haying season of 1907 and claimed that it did not do good work, and declined to pay for it in the fall of 1907; that the parties then agreed that the warranty should be extended for another year; that during the haying season of 1908 the plaintiff went to the defendant's farm to try the rake and make it operate satisfactorily; that he found two small castings broken and some teeth bent, and that he went away and procured the necessary castings and came back a few days later to try the machine again. There is some dispute in the testimony as to just what happened when the plaintiff returned, but according to the plaintiff's testimony he adjusted the castings and started with the machine to go to the hay field, and in doing so necessarily went out into the highway; that when he got into the highway the defendant refused to allow him to return upon his premises with the rake and announced that he would not take the rake back. There was some testimony to the effect that the plaintiff offered the rake for sale to a neighbor after this expulsion from defendant's farm, but this was denied by plaintiff. Plaintiff admitted that he tried the rake to see if it would work, but denied that he had made any further use of it. He stored it, however, upon his own premises. Testimony was conflicting on the trial as to whether the rake did good work or not. At the close of the trial plaintiff announced that he had a witness on the road to court who was bringing a portion of the rake in question for the purpose of introducing it in evidence to show the condition of the woodwork of the machine, and that he would like to have the case held open in order to put it in evidence. The court then said:

"It appearing from the statement of counsel that the witnesses who are expected to arrive on the train, which is some-

what behind time, are witnesses for the plaintiff; that they are bringing with them a portion of the machine to be used on behalf of the plaintiff. Now, the view I take of this case makes the evidence entirely immaterial. When *Mr. Peplinski* in 1908 went to the farm of the defendant in accordance with the agreement made the previous year that the warranty should be extended for a year, and made repairs upon the machine, and the defendant refused to accept it and the plaintiff took it away with him, exercising acts of ownership over it, retaining possession of it ever since, and is attempting to bring into court portions of the machine as evidence on his behalf, I think he is out of court."

Thereupon the court directed a verdict for defendant, and from judgment thereon the plaintiff appeals.

For the appellant there were briefs by *Wallrich, Dillett & Larson,* and oral argument by *A. J. Dillett.*

For the respondent the cause was submitted on the brief of *James H. McGillan.*

WINSLOW, C. J. The defense here was that the contract had been rescinded according to its provisions because the rake was not as warranted. There was serious dispute upon the question whether the rake in any way failed to come up to the requirements of the warranty, hence no verdict could be directed on the ground that breach of the warranty was proven without dispute.

The court seems to have directed a verdict because he thought that the plaintiff had accepted a rescission by acts of ownership over it after he had it in his possession. In this we think there was clear error. Of course, when the defendant denied the plaintiff admission to his premises for the purpose of trying the rake, the plaintiff was entirely justified in taking the rake to his own grounds. Probably he would not have been justified in leaving it in the highway. This act, if simply for the purpose of caring for the rake, cannot be called an act of ownership which would amount to an acceptance

of the offered rescission. The plaintiff denied that he offered the rake for sale to any person; and the fact that he proposed to offer a part of it in evidence as showing that it was not defective cannot logically be construed as an act of ownership. The case of *Cream City G. Co. v. Friedlander,* 84 Wis. 53, 54 N. W. 28, is entirely misconstrued if it be thought to hold such a doctrine. There the use which was held to be an act of ownership was a consumption of the article. The case here should have been submitted to the jury.

By the Court.—Judgment reversed and action remanded for a new trial.

KILPINSKI, Respondent, vs. BISHOP, Appellant.

September 15—October 4, 1910.

Real-estate brokers: Right to commission: Middleman receiving pay from both parties.

1. One employed to find a purchaser for land under a written contract by which he is to receive a commission "for the sale of" the property, "provided a satisfactory deal can be made by" a certain date, is a mere middleman and is entitled to the commission if he produces a satisfactory purchaser, even though he is also agent for and receives pay from such purchaser.
2. The fact that the middleman in such a case confirms representations made by the purchaser as to property exchanged in the deal is immaterial, especially where such representations are not shown to have been false.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover balance due on a commission agreement for selling land.

Plaintiff complained that he was employed by defendant to find a purchaser, satisfactory to the latter, for certain real estate he possessed, the compensation for his services to be

$150; that plaintiff fully performed such agreement, and that there was due and unpaid on account thereof $75.

Defendant answered that the commission contract was in writing and the exact contents thereof unknown to him as it was retained by plaintiff; that when it was made, the understanding was that to earn the commission plaintiff would be required to produce a purchaser for defendant's realty ready, willing, and able to pay therefor in cash or other property $4,500; that defendant sold such realty taking other land in exchange, relying on the honesty of his agent and his representations as to such other property and that such agent was working solely in his interests; that, in fact, plaintiff secretly acted as agent for defendant's customer under promise of pay by him and that plaintiff received such pay; that defendant, without knowledge of such facts, paid plaintiff $75.

Defendant counterclaimed for a recovery of such amount.

The written contract was as follows:

"I, the undersigned, do hereby agree to pay *Martin Kilpinski* the sum of one hundred and fifty dollars for the sale of my hotel property in the city of Seymour, provided a satisfactory deal can be made by January 25, 1909, and not later. After this date this agreement shall be void unless renewed by me."

The evidence showed that plaintiff performed by producing a purchaser for defendant's realty satisfactory to him, and to whom the property was sold, he taking on account thereof other real estate on the faith of representations as to its character made by his customer and corroborated by plaintiff.

At the close of the evidence the court directed a verdict in plaintiff's favor upon the theory that the contract was unambiguous, and clearly showed that plaintiff was employed merely as a middleman, and there was no proof to show that his representations respecting the property taken by defendant were untrue.

The cause was submitted for the appellant on the brief of

Eberlein & Eberlein, and for the respondent on that of *P. J. Winter.*

Marshall, J. The contract of employment is in writing. The writing is not in itself ambiguous. Neither is it uncertain when applied to the subject and situation with which it dealt. Hence there was no legitimate room on the trial for evidence to explain it, and, in no event, any evidence to vary or contradict it. Whether in the progress of executing the agreement respondent did more than the writing, looking at the language thereof, contemplated, as appellant contends, does not make any difference.

If the language of an agreement is ambiguous, either in itself or when applied to the subject matter thereof, the widest scope of permissible evidence in aid of construction does not include engrafting on to the writing a feature not within the reasonable scope of its language, read in the light of all the circumstances.

The paper in its literal sense only called upon appellant to create a condition rendering respondent able to make a deal, satisfactory to himself, by a date mentioned, or in other words, to furnish respondent with a satisfactory customer for his property within such date. It is not perceivable how any other idea could, in any event, be found within the reasonable meaning of the language the parties used. To expand it beyond that scope would be to vary or contradict the contract in the name of construction, not to construe it.

It seems to follow, necessarily, that the respondent was employed as a mere middleman, as the trial court held, rendering the evidence introduced, or offered, regarding his having taken pay from appellant's customer, as well as from appellant, immaterial.

A middleman, employed by a party to merely find a purchaser satisfactory to his employer, may produce another by whom he is also employed and properly take pay from both,

if such purchaser proves satisfactory to such person. In such circumstances, as has frequently been held, it is of no importance to the seller that his agent is at the same time an agent for the person with whom he deals. The seller is supposed to act upon his own judgment in the matter, his agent only creating a condition for him to apply that judgment to. *Donohue v. Padden,* 93 Wis. 20, 66 N. W. 804; *Barry v. Schmidt,* 57 Wis. 172, 15 N. W. 24.

We have not overlooked the fact that respondent, as an inducement to appellant to make the deal, confirmed representations the person produced as purchaser made respecting property he proposed to use in the deal. That is not material, especially in view of the fact that no substantial showing was made that the representations were not correct. The mere fact of itself, that respondent added his assurance to that of the proposed buyer, in order to make him a satisfactory purchaser, does not seem to be of any importance whatever.

By the Court.—The judgment is affirmed.

CEVENE, Respondent, vs. CEVENE, Appellant.

September 15—October 4, 1910.

Divorce: Division of property derived from husband: Title in wife.

Real and personal property accumulated and paid for from a husband's earnings and from the income from sales of produce raised on the land principally by the labor of the wife and children, must in a divorce action be deemed to have been derived from the husband and to be a part of his estate which may be divided between the parties, even though the title to a part of such property be in the wife's name.

APPEAL from a judgment of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Affirmed.*

This is an action for divorce. The parties were married

in 1875. For more than twenty years prior to the commencement of the action the wife and children resided upon a ten-acre tract of land a few miles from the city of Appleton. With the assistance of the children the wife cultivated this tract, raised fruits, berries, and vegetables and disposed of them. Except for short periods during the winters the husband worked in the city as a laborer. After deducting an amount from his wages to give him a frugal living, he turned the balance over to his wife during almost all of their married life. The ten-acre tract has been paid for out of his earnings and the income from the sale of produce therefrom; about $300 worth of personal property has been likewise accumulated on the farm, and there was deposited in savings bank certificates in the wife's name the amount of $1,375, also accumulated from the husband's earnings and the sale of produce from the land. The title to the land is in both the husband and the wife.

The husband brings this action for divorce, alleging cruel and inhuman treatment on the part of the wife. He charges that during the past ten years she quarreled with him without provocation and made his home life unbearable; that she called him vile names and accused him of being intimate with other women; and that in the month of February, 1909, she assaulted him and forcibly expelled him from the house, forbade his returning thereto, and expressed herself as well rid of him.

The defendant denies that she was guilty of cruel and inhuman treatment as charged in the complaint; alleges that the husband has failed to support her and the children; that the support of the family has been provided by her with the assistance of the children; and alleges that the husband is infatuated with a young girl and is desirous of securing a divorce in order to marry this affinity.

The court found the defendant guilty of the cruel and inhuman treatment charged against her and granted a divorce from bed and board; ordered an equal division of the prop-

erty, which was found to consist of this ten-acre tract, valued at $1,500, the personal property thereon valued at $330, and the bank certificates for $1,375; gave the defendant the option of taking the land at $1,500 and personalty of the value of $102.50 or to take $1,602.50 in money; and awarded the plaintiff the other half of the property. This is an appeal from the judgment.

The record does not include in the clerk's certificate the *ne exeat* proceeding instituted by the plaintiff against the defendant, charging that she is about to depart from the state and take with her the moneys deposited in the bank and the proceeds of a sale of all the personal property and household goods, nor the return of the sheriff stating that he has been unable to make service upon the defendant because she has departed from the state. Since this proceeding is not part of the record, the suggestion of respondent's counsel that the appellant has exercised the option given her by the court and accepted the judgment cannot be considered.

The cause was submitted for the appellant on the brief of *A. M. Spencer,* and for the respondent on that of *Francis S. Bradford.*

SIEBECKER, J. Appellant's contention that the trial court's findings on the facts at issue are against the clear preponderance of the evidence is not sustained by the record. The evidence is ample to sustain the conclusion that the defendant's treatment of the plaintiff caused him great suffering of mind and endangered his health and rendered it well nigh impossible for the plaintiff to cohabit with the defendant and discharge his marital obligations. Upon the facts disclosed the court was justified in granting the divorce it did.

It is urged that the defendant's interest in the real estate constituted her separate estate; that it was not derived from her husband, and therefore that she could not be divested thereof by the judgment in this action decreeing a final di-

vision and distribution between the parties of the husband's estate. This claim is negatived by the court's finding on the subject. It was shown and was so found by the court that the real estate and personal property now owned by the parties, as well as the money in the bank, were accumulated from the husband's earnings and the income from the farming enterprise conducted principally by the wife and children. Under these circumstances it cannot be said that any of this property constituted the wife's separate estate. It must be held to have been derived from the plaintiff and be considered a part of his estate. Under these circumstances this constitutes the husband's estate, and it was appropriate to make a final division and distribution thereof between the parties. We find the court so treated it, and are of the opinion that a just and equitable portion thereof was awarded to the wife.

By the Court.—The judgment appealed from is affirmed.

Rogers, Respondent, vs. Van Eps, Appellant.

September 15—October 4, 1910.

Malicious prosecution: Advice of counsel: Malice: Evidence: Sale of mortgaged chattels: Consent of mortgagor.

1. One who institutes a criminal prosecution upon the advice of counsel is bound to state to such counsel fully and fairly all the material facts within his knowledge relating to the offense.
2. Evidence that such full and fair statement was not made to the counsel upon whose advice the prosecution was begun, and that there was not probable cause to believe the accused guilty, is evidence of malice.
3. In an action for malicious prosecution on the charge of selling mortgaged chattels, if it be shown that defendant, the mortgagee, consented to the sale, it is not error prejudicial to him to exclude a question, asked of the plaintiff, as to what she did with the chattels after such consent.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This action was brought to recover damages for malicious prosecution. The complaint charges the making of a criminal complaint and malicious prosecution of the action, trial, and termination of it favorably to respondent before the commencement of the present action. The answer denies specifically all the material allegations of the complaint and avers good faith on the part of the appellant in the criminal prosecution on the advice of counsel after full and fair statement of the facts to him. The jury returned a general verdict in favor of the respondent for $2,000 compensatory and $200 punitory damages. Motions were made to set the verdict aside and for a new trial and for judgment notwithstanding the verdict, which motions were denied and judgment entered for the respondent, from which this appeal was taken.

Francis J. Rooney, for the appellant.

For the respondent the cause was submitted on the brief of *D. G. Classon.*

KERWIN, J. The case was submitted to the jury on a general verdict, and no exception is taken to the charge. The assignment of errors practically raises but two questions: (1) Whether prejudicial error was committed in the exclusion of evidence; and (2) Whether the evidence supports the verdict.

The plaintiff was prosecuted on complaint of defendant for selling property covered by a chattel mortgage given by her to defendant. The prosecution resulted in acquittal of plaintiff, and the main question litigated was whether defendant fully and fairly stated the case to the district attorney who conducted the prosecution. The law is well settled to the effect that, where one institutes a criminal prosecution upon the advice of counsel, he is bound to fully and fairly state the facts to counsel which constitute the alleged criminal charge.

The criminal prosecution was based upon sec. 4467, Stats. (1898), which provides:

"Any person having conveyed any personal property by mortgage, who shall, during the existence of the lien or title created by such mortgage, sell, transfer, conceal, remove or carry or drive away said property or any part thereof, or cause the same to be done, without the consent of the mortgagee or his assigns and with the intent to defraud, shall be punished . . ."

There is ample evidence to warrant the jury in finding that the property sold by plaintiff and covered by the mortgage was sold with the consent of defendant, and that this fact was not stated or made known to the district attorney by defendant. This question was fairly submitted to the jury. The court told the jury in effect that if they found that defendant, before instituting the criminal proceedings against plaintiff, consulted the district attorney and gave him a full, fair, and truthful statement of all the facts and circumstances relating to the alleged offense which were known to him and then acted upon the advice of the district attorney, their verdict should be for the defendant.

The appellant makes the point that there was not sufficient proof of malice. We cannot agree with counsel in this contention. The fact that there was evidence to the effect that a full and fair statement had not been made to the district attorney and that there was not probable cause to believe the plaintiff guilty, was evidence of malice. There is also other evidence in the record from which the jury would be justified in inferring malice. The questions in the case were fairly jury questions upon disputed facts. The jury resolved such questions adversely to appellant and the verdict is supported by the evidence.

Error is assigned upon the ruling of the court sustaining objection to a question put to plaintiff as to what she did with cattle taken with her to Newald. The main question liti-

gated on the trial was whether the property covered by the mortgage was sold without the consent of defendant, and there is evidence that the defendant assented to the sale of all articles covered by the mortgage and sold by plaintiff. What became of the cattle after defendant consented to the sale of them was immaterial. Moreover the question was answered later by the respondent and a full explanation made by her. We think no prejudicial error was committed.

By the Court.—The judgment of the court below is affirmed.

SCHWENN, Respondent, vs. SCHWENN, Appellant.

September 16—October 4, 1910.

(1) *Appeal: Questions of fact.* (2, 3) *Divorce: Alimony: Antenuptial contracts.*

1. Decisions of trial courts on issues of fact will not be disturbed on appeal unless the record shows to a reasonable certainty that they are prejudicially wrong.
2. In view of an antenuptial contract between the parties in this case by which the wife released all claims upon the husband's property except that she was to receive $500 if she survived him, and regarding such contract as unaffected by a judgment of divorce, it was error to provide in such judgment for a division of the husband's property or to award to the wife anything more than a reasonable allowance for alimony; and such allowance, under the circumstances of this case, should not exceed $1,000.
3. Whether in case of such an antenuptial contract the court can, in a judgment of divorce, without consent of the parties, make a division of property or award to the wife anything beyond alimony, strictly so called, is not determined.]

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed in part; reversed in part.*

Action for divorce on the ground of cruel and inhuman treatment. The court found in plaintiff's favor and rendered judgment accordingly.

The evidence bearing on property matters was to this effect: The parties became husband and wife in 1902. At the time of the trial, plaintiff was about sixty-one years of age and defendant a few years older. Each had children by a former marriage, but there were no children by their union. When they were married she was worth about $700, consisting, in the main, of a small farm. They lived thereon, at her request, some over two years, during which time the property was increased in value, largely by the industry and earnings of defendant, so it sold for some $1,400. No part thereof, so far as appears, went to enrich defendant. So long as the parties resided together defendant supported plaintiff, as he claimed. The evidence is silent as to any part of her property being used in such support, or income thereof being devoted thereto, except that of the farm so long as plaintiff kept the same. At the time of the marriage defendant was worth around $10,000 in personal property, which was not materially increased or diminished up to the time of the trial. The property, to the extent of $8,000, consisted of notes given to him by his children, drawing interest at the rate of five per cent. per annum, payable annually. The notes were for land deeded to the children and secured thereon and made payable after defendant's death, the design being to afford him an income during his life of $400 per year. Plaintiff understood this property situation before the marriage. With such knowledge an antenuptial contract was made between the parties by the terms of which it was provided as follows: 1st. In case of plaintiff surviving defendant, she to have $500 out of his property. 2d. She released all claims upon the property he possessed at the time of the marriage, or might thereafter acquire, except the contingent interest of $500. 3d. They to reside on the farm owned by plaintiff

and devote the income thereof to their joint support. 4th. In case of sickness of one, the other to care for such one in a proper manner. 5th. In case of defendant surviving plaintiff, he to surrender the farm to her heirs, but the household furniture to go to the survivor of the two. 6th. Defendant to keep up repairs on the farm and keep down all taxes and pay expenses of insuring the buildings during the joint occupancy.

The court made no finding as regards what became of plaintiff's property, nor any reference thereto otherwise, except to observe, in a preliminary decision, that the farm was "sold for $1,400, although it does not appear what portion of the consideration went to her." The findings, in addition to being in plaintiff's favor as regards the cause for divorce, were to the effect that defendant was possessed of property of the value of $10,000, $8,000 being the notes aforesaid, bearing interest payable annually at the rate of five per cent., and due sixty days after defendant's death; and that plaintiff was possessed of little, if any, property, and by reason of her age and condition was unable to support herself without endangering her health.

On such findings, the court, in addition to awarding judgment for divorce as prayed for, decided that the property possessed by defendant should be finally divided between the parties, $2,000 thereof being either satisfactorily secured to plaintiff before entry of judgment, or otherwise that a four-fifths interest in one of the $2,500 notes held by defendant should be assigned to her, the particular note to be the one of her choice.

The $2,000 was not satisfactorily secured to plaintiff before the entry of judgment, and, upon defendant consenting to her having a lien to that extent upon a $3,000 note held by defendant instead of a four-fifths interest in a $2,500 note, judgment was rendered accordingly.

Nothing was said in the findings or judgment expressly

taking account of the antenuptial agreement as to the $500, though the judgment was, in form, a division of property and settlement of all plaintiff's property rights.

The cause was argued April 26, 1910.

John C. Fehlandt, for the appellant.

Daniel H. Grady, for the respondent.

The following order was filed May 24, 1910:

By the Court.—The case is ordered to be placed on the August calendar, 1910, for reargument on the question of whether, in case of such an antenuptial contract as that between the parties, the court can, without consent of such parties and in the circumstances of this case, make a division of property between such parties or adjudge to the divorced woman permanent relief of a pecuniary nature, other than alimony strictly so called.

Upon reargument, September 16, 1910, the cause was submitted for the appellant on the brief of *John C. Fehlandt,* and for the respondent on that of *Daniel H. Grady.*

The following opinion was filed October 4, 1910:

Marshall, J. It does not seem best to say much more in regard to objections in that the findings of fact do not support the cause of action for a divorce on the ground of cruel and inhuman treatment, than that they do not appear to be against the clear preponderance of the evidence, referring to the rules on the subject. It may be conceded that the evidence, as it impresses one by reading the record, is not very satisfactory. It may even be conceded that such reading leaves the impression that injustice may have been done the appellant and that, perhaps, a finding in his favor would appear more satisfactory than one against him, and yet the judgment be proof against attack.

As has often been said, much weight must be given, on appeal, to the trial judge's decision on issues of fact, where it is

not reasonably clear that the law was misapplied. They must, for reasons often suggested, not only be regarded as conclusive, unless contrary to the clear preponderance of the recorded evidence, but as supported by all reasonable inferences as regards the proper persuasive effect of appearances and circumstances which might, within reasonable probabilities, have efficiently and legitimately challenged the attention of the trial judge, yet do not, and could not be made to, appear of record. In the light of that rule the instances must, necessarily, be quite exceptional where such reasonable expectation of relief upon appeal can exist as regards matters of fact as to warrant burdening litigants with the expense of an effort in that regard, and still more exceptional where such expectation can be realized. If the futility which actually, and must necessarily, exist of appeals to this court on purely matters of fact, were fully appreciated, the otherwise waste of energy and expense of litigation of that character would be avoided.

These general observations are not intended to suggest that the case in hand is not so fairly within the exceptional class, from the standpoint of the practitioner, as to warrant presenting it for our consideration, but rather to indicate that the dignity given here to decisions of trial courts on issues of fact, is sufficient to prevent them from being disturbed even where the printed record creates serious doubts as to whether justice has been done. Such realm of even such doubts must be passed and conviction to a reasonable certainty created, not only that the decision is wrong, but prejudicially so, else it must be regarded as right, though on many minor matters harmlessly wrong.

No more need be said regarding the subject discussed at length in the argument of counsel for appellant. As a rule, in case of an unsuccessful challenge, upon appeal, of a trial court's decision upon issues of fact, no discussion of the evidence, in general or particular, will be indulged in. The con-

clusion only will be stated, referring to the well known canon governing the subject, with such general observations, from time to time, as may seem advisable to keep the significance thereof constantly in view.

The disposition made by the trial court of property matters cannot be approved.

The antenuptial contract is not affected by the judgment, nevertheless such judgment awards respondent a large estate out of appellant's property. Whether it is proper to do that, and whether in case of a valid antenuptial contract, as in this case, it is proper for the court to award to the wife anything but alimony, are important and interesting questions upon which a reargument was ordered and has been had. It seemed at first, that such questions should, or at least well might, be decided in this case. However, it is now considered that the questions of law are so important that they should not be settled except after an exhaustive study and a more full argument by counsel than we have been favored with, and when necessary. That condition does not now exist, since it is considered that, regarding the antenuptial contract as unaffected by the result, proper administration, in this case at least, requires the making of a reasonable allowance for alimony only, and that it was error to do otherwise, and error to award respondent so large a sum of money as $2,000, either by way of alimony or upon a division of property, she to have also, under the antenuptial contract, $500 in case of her surviving appellant.

The reasons for the conclusion, that the award was too large, whether considered as alimony or as respondent's portion of the joint property, or both, upon a final division thereof, we need not spend time to give. It is sufficient for the case to state the conclusion.

The foregoing calls for a reversal of the judgment as to property matters and entry, in place thereof, of judgment awarding respondent such sum for alimony as the nature of

the case seems to justify, which, in the judgment of the court, does not exceed $1,000. It is therefore considered that an award for alimony of that sum should be made, it being understood that the antenuptial contract secures to respondent $500 additional on the contingency mentioned therein.

It will be left to the trial court, on application of either party and on notice to the other, to fix a reasonable time for appellant to pay the $1,000, or secure payment thereof, and to render judgment accordingly, pursuant to the mandate of this court.

By the Court.—The judgment dissolving the marriage contract is affirmed; the judgment as to property matters is reversed, and the cause remanded with directions, upon the *remittitur* being filed in the court below and application of either party upon ten days' notice to the other, that the trial court add to the judgment of divorce an appropriate provision for payment to appellant of $1,000 as alimony at such time and secure payment thereof in such way as to such court may appear just, the judgment not to disturb plaintiff's right to $500 under the antenuptial contract. No costs will be allowed in this court to either party, but appellant will pay the clerk's fees.

STATE, Plaintiff in error, vs. BROWN, Defendant in error.

September 17—October 4, 1910.

Criminal law: Pleading: Certainty: Liberal construction: False pretenses: "Inducing" payment of money: Sheriffs.

1. An indictment against a sheriff charging that, by false pretenses in presenting a bill against the county for board of pretended prisoners who were not in fact in his custody during the time covered by the bill, he "did *induce* said M. county to pay" to him a specified sum of money, is not defective as failing to allege that defendant actually *obtained* the money.
2. Certainty to a common intent is all that is required in charging an offense in an indictment, under the rule prevailing in this

state; and such certainty is attained by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one.

3. The letter as well as the spirit of our statute law is against the application of strict technical rules to the construction of indictments or informations, particularly where the defendant is deprived of no substantial right by the adoption of a more liberal rule of construction.

4. In an indictment against a sheriff for false pretenses alleged to have been made to the county in presenting a false bill for board of pretended prisoners, it was not necessary to name the individual officers of the county to whom the false pretenses were made, since the statute prescribes the officer with whom a claim must be filed, the body that must audit the bill, the officers who must sign the warrant, and the one charged with its payment.

5. It is not a valid objection to such an indictment that it fails to show that all the formalities prescribed by sec. 677, Stats. (1898), were observed in relation to the preparation, verification, and filing of the claim. If the false pretenses made were calculated to and did deceive the county, so that it parted with its money to defendant, that is sufficient.

Error to review a judgment of the circuit court for Marinette county: S. D. Hastings, Circuit Judge. *Reversed.*

An indictment containing ten counts was returned by a grand jury impaneled in Marinette county, wherein it was attempted to charge the defendant in error (hereinafter called the defendant) with the commission of ten different offenses. The first count in the indictment was as follows:

"*Thomas W. Brown,* being then and there the duly elected, qualified, and acting sheriff of Marinette county, in the state of Wisconsin, contriving and intending, knowingly and designedly by false pretenses, to cheat and defraud the said county of Marinette of money belonging to the said county of Marinette, did on the said 13th day of November, 1905, in Marinette county, knowingly and designedly, falsely pretend to Marinette county that one Lizzie Plant had been incarcerated in the county jail for Marinette county from the 14th day of September, 1905, to and including the 31st day of October, 1905, in accordance with a sentence passed upon the said Lizzie Plant by the police court of the city of Marinette

on the 14th day of August, 1905, and that there was justly due the said *Thomas W. Brown* the sum of eighteen dollars and eighty cents for boarding the said Lizzie Plant as such prisoner while so incarcerated in said jail during said period of time, which said false and fraudulent representations were made by the said *Thomas W. Brown* presenting to the said Marinette county a sworn bill or statement alleging that said sum of eighteen dollars and eighty cents was then justly due and owing the said *Thomas W. Brown* from Marinette county for boarding the said Lizzie Plant during said period of time, by which false pretenses the said *Thomas W. Brown* did then and there unlawfully and feloniously induce the said Marinette county to pay the said *Thomas W. Brown* the said sum of eighteen dollars and eighty cents of its money, good and lawful money of the United States, the said Marinette county then and there relying upon the said representations so made; whereas in truth and in fact the said Lizzie Plant was not incarcerated in said jail in Marinette county for said period of time nor any part thereof, and that there was nothing due the said *Thomas W. Brown* for boarding the said Lizzie Plant as a prisoner in said county jail during said period of time; contrary to the law in such case made and provided and against the peace and dignity of the state of Wisconsin."

The remaining counts returned related to other separate and distinct alleged illegal and fraudulent claims presented by the defendant to Marinette county, the language used in charging the offense being similar to that employed in the first count. The defendant demurred to each of the counts in the indictment, on the ground that no offense known to the law was stated therein. To review an order sustaining such demurrer and a judgment discharging the defendant, the state prosecutes a writ of error to this court.

For the plaintiff in error there was a brief by the *Attorney General* and *Samuel H. Cady*, special counsel for Marinette county, and oral argument by *Mr. Cady*.

For the defendant in error there was a brief by *Feeney & Miller* and *James H. McGillan*, and oral argument by *Mr. McGillan*.

Barnes, J. This case comes before us by virtue of sec. 4724*a*, Stats. (Laws of 1909, ch. 224), on a writ of error sued out to review the decision of the lower court in sustaining a demurrer to an indictment. It is the first cause brought to this court at the instance of the state to review a judgment in a criminal action since the above statute was enacted.

The defendant contends that the indictment is faulty in the following particulars: (1) In not averring that defendant *obtained* the money referred to in the various counts in the indictment; (2) in setting forth that the false pretenses were made to Marinette county without naming the officers of the county to whom the pretenses were made; and (3) in failing to allege that the formalities required by sec. 677, Stats. (1898), in regard to the making, filing, and verifying of the claims presented by the defendant against the county, were observed. The court sustained the demurrer on the first of the grounds above stated.

1. Sec. 4423, Stats. (1898), provides that "Any person who shall designedly, by any false pretenses . . . and with intent to defraud, obtain from any other person any money," shall be punished as therein provided.

"The gravamen of the crime is the obtaining of the property described. . . . This statute, like other criminal statutes, must receive strict construction." *Bates v. State,* 124 Wis. 612, 615, 103 N. W. 251, and cases cited.

It is contended by the defendant that the allegation of the indictment, "By which false pretenses the said *Thomas W. Brown* did then and there unlawfully and feloniously induce the said Marinette county to pay the said *Thomas W. Brown* the said sum of eighteen dollars and eighty cents of its money, good and lawful money of the United States, the said Marinette county then and there relying upon the said representations so made," does not charge that the defendant Brown *obtained* the money, or even that the county parted

with it. It is urged that the word "induce" may well mean to persuade, to convince, or to tempt, and that defendant might tempt, persuade, or convince the county that it should pay the money in question, but that until he actually received it no crime was committed under the section of our statutes referred to. The following authorities are cited as sustaining the defendant's position: *Comm. v. Lannan,* 1 Allen, 590; *State v. Phelan,* 159 Mo. 122, 60 S. W. 71; *Connor v. State,* 29 Fla. 455, 30 Am. St. Rep. 126; *State v. Lewis,* 26 Kan. 123; *Kennedy v. State,* 34 Ohio St. 310. The point decided in each of the authorities cited is closely analogous to the one raised in the case before us, and the trial court with considerable reluctance concluded to follow the decided cases. No case decided under a similar statute has been called to our attention where an indictment such as the one before us has been held good.

Precedents from foreign jurisdictions on matters of pleading and practice in criminal cases are often illusory and misleading. Some courts have adopted extremely strict and often highly technical rules for the construction of indictments and informations. Others have followed more liberal and more reasonable rules. In many of the states the rigor of rules formerly laid down has been mitigated by statute law. On a question such as the one before us the judgments of other tribunals may aid, but they cannot control or conclude this court.

The indictment in this case states that the defendant "did . . . induce said Marinette county to pay" him the sum of $18.80. Taking this language in its usual acceptation, it means that Marinette county paid over to the defendant, and that the defendant received and obtained from it, the sum stated, and it would, we think, be so construed by ninety-nine out of every hundred persons reading it. The learned counsel for the defendant frankly admitted on the argument that such was the impression it created on his mind when he first

read it, and that he arrived at the conclusion that a different meaning might be attributed to it only after his industry had been rewarded by finding the cases cited.

If it be conceded that the language used might be susceptible of the meaning contended for by defendant, it does not follow that the indictment is bad, assuming that the language used would in its ordinary and usual acceptation be understood to mean that the defendant in fact obtained the money.

It has never been held in this state that certainty to a certain intent in particular was required in criminal pleading, although such certainty is, or at least formerly was, required in many jurisdictions. 1 Bouv. Law Dict. (Rawle's Rev.) 300, and cases cited. In *State v. Downer,* 21 Wis. 274, it was held that "certainty in charging the offense to a common intent is all that is required by the rules of pleading in regard to indictments." Such certainty is attained "by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one." 1 Bouv. Law Dict. (Rawle's Rev.) 299.

The letter as well as the spirit of our statute law is utterly antagonistic to the idea of applying exceedingly strict and technical rules to the construction of indictments or informations. This is particularly true where, as here, the defendant is not deprived of any substantial right by adopting a more liberal rule of construction and one more consonant with reason and better calculated to promote the ends of justice.

Sec. 4658, Stats. (1898), provides that an information shall be sufficient if it can be understood therefrom that the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case. Sec. 4659 provides that no indictment or information shall be deemed invalid by reason of any defect or imperfection in matters of form which shall not

tend to the prejudice of the defendant. Sec. 4669 provides that words used in the statutes to define a public offense need not be strictly pursued in charging an offense under such statutes, but other words conveying the same meaning may be used. Sec. 4706 provides that no indictment or information in a criminal case shall be abated, quashed, or reversed for any error or mistake, where the person and the case may be rightly understood by the court, and the court may on motion order an amendment curing such defect.

Sec. 2829, Stats. (1898), provides that the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. This statute has been held to apply to criminal as well as to civil cases. *Odette v. State,* 90 Wis. 258, 262, 62 N. W. 1054; *Cornell v. State,* 104 Wis. 527, 80 N. W. 745; *Vogel v. State,* 138 Wis. 315, 329, 119 N. W. 190. Sec. 2829, Stats. (1898), has to some extent been amplified by sec. 3072*m,* Stats. (Laws of 1909, ch. 192).

Believing as we do that the language used in the indictment would in its ordinary acceptation be understood to charge the defendant with having received or obtained the money, and bearing in mind that it is not necessary to use the exact lan guage of a statute in pleading, and being further convinced that the defect complained of does not tend to prejudice the defendant, we feel no hesitancy in saying that the demurrer should not have been sustained on the ground upon which it was held good. The indictment states an offense under the *Downer Case,* cited *supra.* To hold the pleading bad would be to ignore that decision as well as the statutes cited. The statutes referred to should be so construed as to effectuate the purpose which the legislature had in mind in passing them. *State ex rel. McKay v. Curtis,* 130 Wis. 357, 110 N. W. 189.

The rights of a defendant in a criminal case should be jealously and scrupulously guarded and protected by the courts. But this does not mean that a person accused of crime should

be turned loose on mere technicalities which in no way involve the merits of the case. Such maladministration of our criminal law should not be encouraged or tolerated. If the defendant in this case did not obtain the moneys charged in the various counts in the indictment, he has a perfect defense to each and every count therein contained and is not deprived of any right to avail himself of such defense.

2. It was not necessary to name the individual officers of Marinette county to whom the false pretenses were made. The statutes prescribe the officer with whom a claim must be filed; the body that must audit the bill; the officers who must sign the warrant when the bill is allowed; and the officer charged with the payment of the warrant. It is perfectly apparent from the indictment in this case that the false pretenses were made to the county board of Marinette county, and were made to it by representations on defendant's part that he had boarded divers prisoners in the jail of Marinette county for certain definite periods of time, when in fact he had not done so. The indictment sufficiently informed the defendant of the charge against him. Nothing is said in *Bates v. State,* 124 Wis. 612, 103 N. W. 251, that is contrary to the views here expressed.

3. Neither do we think the point well taken that the indictment fails to show that all of the formalities prescribed by sec. 677, Stats. (1898), were observed in relation to the preparation, verification, and filing of the defendant's claim. It does show that the statute was substantially complied with. Whether it was or not would not seem to be controlling. If the false representations made were calculated to and did deceive the county so that it parted with its money, and the defendant obtained it, that is sufficient. *Roberts v. People,* 9 Colo. 458, 13 Pac. 630; *People v. Carolan,* 71 Cal. 195, 12 Pac. 452; *State v. Stewart,* 9 N. Dak. 409, 83 N. W. 869; *Berreyesa v. Territory* (Ariz.) 76 Pac. 472. The demurrers interposed to the various counts in the indictment should have been overruled.

By the Court.—The order and judgment of the circuit court is reversed, and the cause is remanded with directions to set aside the order sustaining the demurrers to the indictment and to enter an order overruling the same.

OLSON, Plaintiff in error, vs. THE STATE, Defendant in error.

September 17—October 4, 1910.

Intoxicating liquors: Sale on Sunday: Evidence: Questions for jury: Instructions: Sale by employee contrary to orders.

1. Upon the conflicting evidence in this case as to whether the beverage sold by defendant on Sunday was beer or ginger ale, the question was one for the jury and their finding should not be disturbed.
2. Such question, in view of admitted facts, was the only question in issue, and the jury were properly so instructed.
3. The proprietor of a saloon whose barkeeper sells liquor therein on Sunday is guilty of a violation of sec. 1564, Stats. (1898), even though the sale was contrary to his positive instructions.

ERROR to review a judgment of the circuit court for Florence county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The plaintiff in error (hereinafter called defendant) was convicted under sec. 1564, Stats. (1898), of selling and giving away intoxicating liquors on Sunday. The facts will sufficiently appear from the opinion.

VINJE, J. 1. The first error assigned is that the evidence does not sustain the verdict. There is a direct conflict in the testimony as to what was drank in the saloon on the night in question. The witness Sherwin, on behalf of the state, testified it was beer; that he saw the men drink, and examined the glasses on the bar after the drinking had taken place, and, from such examination, he knew it was beer. Two witnesses for defendant, who are claimed by the state to have drank beer, testified that it was ginger ale and not beer that they

drank. The third witness does not recollect that he drank anything that night. On this state of the testimony it was peculiarly a question for the jury to find what the fact was. Their finding, sustained as it is by the trial court in denying a motion for a new trial, will not be set aside unless this court can say that there is no credible evidence to support it, or unless it is inconsistent with facts conclusively proved. *Schuster v. State,* 80 Wis. 107, 115, 49 N. W. 30; *Van Haltren v. State,* 142 Wis. 143, 124 N. W. 1039. The court can say neither.

2. It is urged that the trial court erred in instructing the jury as follows:

"It is the law of the state of Wisconsin, that if a saloonkeeper employs another person to act for him in the conduct of his business, and such employee or bartender, as he is usually called, violates the law relating to excise, that the saloonkeeper is guilty of the violation as if he had been personally present or had done the act himself. In other words, the act of the barkeeper is the act of his employer. This is true even if the barkeeper does the act against the positive instructions of the saloonkeeper. In this case it makes no difference with the legal guilt of the defendant if you find that the sale was made and that the barkeeper was instructed not to make it."

We perceive no error in this instruction. Sec. 1564, Stats. (1898), imposes a penalty upon the acts therein described irrespective of the motive or intent of the person doing them. Its purpose is to regulate the conduct of the liquor business and to prohibit the specified acts whether done by the licensee himself as principal or by his bartender as agent. In such case the principal is as responsible for the acts of his agent as though they were done by himself. He cannot be screened behind the fact that he has given his agent positive instructions not to do them. *State ex rel. Conlin v. Wausau,* 137 Wis. 311, 314, 118 N. W. 810.

3. The further contention is made that the trial court

erred in instructing the jury that the only question in the case was:

"What was the beverage which it is conceded those men drank at that time? If you find that it was ginger ale, as claimed by the defendant, then you must return a verdict of not guilty. If, on the other hand, you find beyond a reasonable doubt that it was beer, then your verdict should be guilty."

It was admitted upon the record that the defendant was a licensed saloonkeeper; that the day in question was Sunday; that the bartender was the man who then had charge of the premises, and that he gave the men something to drink. The only question in issue, therefore, was, What was the beverage given the men to drink? Manifestly the instruction was proper.

By the Court.—Judgment affirmed.

HAVERLUND, Respondent, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

September 13—October 25, 1910.

Negligence: Same act cannot be both ordinary and gross negligence: Inconsistent verdict: Pleading: Joinder of causes of action: Trial.

1. The same act cannot constitute both ordinary negligence and gross negligence, the two being separate and distinct legal wrongs, one involving inadvertence and the other involving at least a sufficient degree of intent to be inconsistent with inadvertence.
2. A special verdict finding that defendant's brakeman, in assisting plaintiff to ascend the steps of the car, did not exercise ordinary care, and also that in so doing he exerted "force upon plaintiff in a wilful and wanton manner, either intentionally or without any regard to whether she might or might not suffer personal injury through his acts," is uncertain and indefinite, and judgment for plaintiff should not be awarded thereon. TIMLIN, J.,

is of the opinion that the findings are not inconsistent, and that the latter finding should in this case have been stricken out or disregarded because not within the issues made by the pleadings.

3. One who has suffered injury from actual misconduct of another but does not know whether such misconduct constituted ordinary negligence or gross negligence, may set out the wrongful act in different counts alleging different causes of action, for the purpose of meeting the different and conflicting inferences that may reasonably be drawn from the evidence adduced.

4. If in such case the evidence or the reasonable inferences therefrom be so conflicting as to require that a jury determine which of the alleged causes of action, if any, is sustained thereby, the trial court should inform them of their duty to determine this question and require them to find which cause of action, if any, has been established.

APPEAL from a judgment of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Reversed.*

On April 1, 1908, the plaintiff was a passenger on the defendant's passenger train from the city of Stillwater, Minnesota, to the village of Knapp, Wisconsin. It was necessary for her to change cars at the city of Hudson and there take a train which would carry her to Knapp. A brakeman of the defendant company assisted passengers from and onto the cars. The complaint states:

"That the said plaintiff relied upon said aid and assistance of the agents of said defendant in charge of said train, to wit, one of its brakemen on said train, and relying upon said aid and assistance of said brakeman attempted to board said train, and that while attempting to board said train with the aid and assistance of said brakeman one of the feet of said plaintiff slipped on one of the car steps of said car and said plaintiff was thrown or jerked against the car of said train and thereby suffered severe and permanent injuries.

"That said defendant was negligent for the reason that the said defendant, its officers and agents, had negligently and carelessly failed to provide safe and sufficient steps on its said cars by reason of the fact that the said defendant, its officers and agents, had negligently and carelessly allowed snow

and ice to form and remain on said car steps, with knowledge at all times that the presence of snow and ice on said car steps was wholly unsafe and dangerous to its said passengers and this plaintiff, and had negligently and carelessly failed to prevent such slippery condition, caused by such accumulation of snow and ice, by negligently and carelessly failing to throw ashes and sand thereon, and in negligently and carelessly failing to remove said slippery condition and such accumulation of snow and ice, and in negligently failing to prevent the forming of such slippery condition.

"That the said defendant, its officers and agents, was negligent for the reason that it negligently and carelessly failed to warn its said passengers and this plaintiff of the unsafe, defective, and slippery condition of said car step, and that it was unsafe and dangerous for the said plaintiff to board said train without such warning.

"That said defendant was negligent for the reason that it negligently and carelessly failed to provide sufficient and competent servants and brakemen to properly aid and assist its passengers and elderly, infirm, and enfeebled passengers and this plaintiff upon its said trains.

"That said defendant was negligent for the reason that the servant and brakeman assisting said plaintiff on said train negligently and carelessly aided and assisted said plaintiff upon said train and the said brakeman was negligent in helping and assisting the said plaintiff upon said train."

On the trial the plaintiff testified that as she stepped onto the car step a stranger had hold of her arm and was assisting her; that her foot with which she stepped onto the car step slipped from the car step to the depot platform; that as she was falling, the brakeman, who stood upon the car steps,

"jumped up and grabbed me with both arms and kind of throwed me around against the iron banister or baluster that went up the steps, right at the head, and he hit this hip against the bar, and then it pained and I felt there was something hurt, that is, some kind of a give, and from that on it pained until I just got crazy. That is the first that I felt pain in my hip was when he throwed me against that baluster awful hard. I tried to get up onto this foot, but I

found I couldn't use that foot at all, but he just took me not waiting, kind of dragged me in the aisle and set me in the second or third seat in the car."

The brakeman testified to the effect that he did not take hold of the plaintiff and jerk and throw her against the iron railing, and that he rendered her the assistance necessary to help her into the car in her infirm and apparently crippled condition.

At the conclusion of the plaintiff's case the defendant moved to strike out the evidence of wilful misconduct on the part of the brakeman as not within the issues raised by the pleadings, and for a nonsuit on the ground that the evidence did not show liability on the part of the defendant within the issues raised by the pleadings. The motion was overruled.

At the conclusion of the evidence the court allowed an amendment to the first paragraph of the complaint quoted above, so that it should read as follows, after where it says, "one of the feet of said plaintiff slipped on one of the car steps of said car:"

"and said plaintiff while so being assisted by said defendant's brakeman upon said train was negligently and carelessly thrown, jerked, pushed, or hit by said brakeman against the car of said train and thereby suffered severe and permanent injury."

A motion to strike out the evidence of wilful misconduct on the part of the defendant's brakeman and a motion to direct a verdict for the defendant were denied by the court.

The court denied plaintiff's motion to reject question No. 1 of the special verdict or to modify it, and refused to submit the list of questions prepared by the plaintiff and one prepared by the defendant. While the case was being argued by counsel, the court added question No. 7½ to the ten questions theretofore prepared by the court. Plaintiff's objection to the submission of this question was also overruled.

The jury found by the special verdict that the plaintiff

did not sustain her injuries by slipping from the first step of the car to the station platform; that the step was slippery by reason of the ice accumulated thereon; that its slippery condition caused the plaintiff to slip thereon at the time she stepped upon it; that the accumulation of ice upon the step was not the result of a want of ordinary care on the part of the defendant, and that it was not the proximate cause of the plaintiff's injuries. The following questions were also submitted to and answered by the jury:

"(6) Did the plaintiff sustain her injuries by the striking of her hip against an iron bar or railing at the top of the car steps, at the time the brakeman lifted or jerked her up to the platform in the vestibule outside the car door? *A.* Yes.

"(7) If you answer the last question 'Yes,' then did defendant's brakeman exercise ordinary care in assisting the plaintiff to enter defendant's car at the time he assisted her from the car steps to the platform of the vestibule? *A.* No.

"(8) If you answer 'No' to question No. 7, then answer this: Ought the defendant's brakeman reasonably to have foreseen that some injury might probably result to plaintiff from the manner in which he assisted plaintiff up the car steps and into the car at the time in question? *A.* Yes.

"(7½) If you answer question No. 7 'No,' then in taking hold of and assisting the plaintiff up the steps of said car, did the brakeman in so doing exert force upon the plaintiff in a wilful and wanton manner, either intentionally or without any regard to whether she might or might not suffer personal injury through his acts? *A.* Yes."

The jury also found that the plaintiff was not guilty of any want of ordinary care contributing to produce her injuries, and assessed the damages. The court denied motions to change the answers to some of the questions of the special verdict, and judgment was entered in plaintiff's favor for the sum awarded, with costs, upon the verdict as rendered. This is an appeal from the judgment.

For the appellant there was a brief by *Jas. B. Sheean* and *Bundy & Wilcox,* and oral argument by *R. P. Wilcox.*

W. H. Frawley and *T. F. Frawley,* for the respondent.

Siebecker, J. The complaint charges ordinary negligence in two respects, namely, that the railroad company carelessly allowed snow and ice to accumulate on the car steps, causing plaintiff to slip and injure herself, and that the defendant's brakeman assisted the plaintiff to ascend the car steps in a careless and negligent manner and thereby caused her to be thrown against a railing near the car entrance and injured. The defendant company denied the negligence charged in the complaint. The defendant avers that the trial court erred in overruling its motions for a nonsuit, for the direction of a verdict, for changing the jury's answers to questions in the special verdict, and for judgment notwithstanding the verdict. All these motions are based on the claim that the evidence does not sustain the cause of action alleged in the complaint.

From the evidence in the case it appears that the trial court correctly held that the evidence permitted inferences tending to support either the charge of ordinary negligence, as alleged in the complaint, or that of gross negligence on the part of the defendant's brakeman. Conformably to its view, the trial court submitted to the jury appropriate inquiries under the issues litigated respecting the alleged negligence, of the slippery condition of the car steps, and the alleged negligent conduct of the brakeman, and whether or not the negligence thus alleged was the proximate cause of plaintiff's injuries. By a separate question (No. 7½) the court also required the jury, in case they found the brakeman was guilty of a want of ordinary care in assisting plaintiff to ascend the steps and enter the car, to determine whether or not the brakeman, in rendering such assistance, exerted "force upon the plaintiff in a wilful and wanton manner, either intentionally or without regard to whether she might or might not suffer personal injury through his acts." The jury by their verdict negatives the claim that the plaintiff was injured by the slippery condition of the car steps and that she was guilty of any con-

tributory negligence, and found that the plaintiff's injuries were sustained by striking her hip against an iron bar at the top of the car steps at the time the brakeman lifted or jerked her onto the platform in the vestibule outside of the car door. They found that the brakeman did not exercise ordinary care in so assisting her and (question No. 7½) that he exerted "force upon the plaintiff in a wilful and wanton manner, either intentionally or without any regard to whether she might or might not suffer personal injury through his acts." The trial court considered that the evidence permitted these different inferences characterizing the brakeman's conduct, and that the state of the evidence made it appropriate for the jury to determine if he was guilty of ordinary negligence as charged in the complaint and of gross negligence as specified in question No. 7½.

We regard it as established by the verdict that the jury found the brakeman was guilty of a want of ordinary care (question No. 7 of the verdict). The trial court, in denying the different motions of the defendant, held that the verdict established that the brakeman did not exercise ordinary care while assisting the plaintiff to board the car and that this sustained the cause of action alleged in the complaint, namely, that the defendant was guilty of ordinary negligence. Were this the only finding in the verdict on this subject, it would present a consistent verdict sustaining the cause of action alleged and entitle the plaintiff to judgment in her favor. Does the finding of the jury in answer to question No. 7½, that the brakeman exerted "force upon the plaintiff in a wilful and wanton manner, either intentionally or without any regard to whether she might or might not suffer personal injury through his acts," negative the finding that he was guilty of a want of ordinary care as alleged in the complaint and as found in answer to question No. 7? The court in awarding judgment on the verdict construed this finding as establishing that the brakeman's conduct amounted to

gross negligence and awarded the plaintiff judgment on the theory that "in a suit alleging want of ordinary care on the part of defendant, there is not, and cannot be, any inconsistency in logic or in principle, or any harm to the defendant, in allowing a recovery for any sort of wrong which betokens lack of that carefulness which the law demands," and that the defendant owed the duty of carefulness to the plaintiff, for breach of which the plaintiff could recover, and it was therefore immaterial whether the breach of duty amounted to mere inadvertence or to such wilful and wanton recklessness as is deemed equivalent to an intent to injure, and which in the decisions of this court is termed "gross negligence." This subject has received repeated treatment in our former decisions, the result whereof is briefly stated in the case of *Wilson v. Chippewa Valley E. R. Co.* 120 Wis. 636, 98 N. W. 536, in these words:

"This court has held that, where the complaint simply charges negligence or want of ordinary care, there can be no recovery on the ground of wilful injury, or that reckless and wanton disregard of another's rights equivalent to wilful injury, which has been termed 'gross negligence,' because this is a different cause of action. Is the converse of the proposition true? We think it must logically be so held."

See, also, *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446, where it was said:

"Inadvertence, in some degree, is the distinguishing characteristic of negligence, while misconduct of a more reprehensible character, characterized by rashness, wantonness, and recklessness of a person as regards the personal safety of another, has been designated by this court as gross negligence."

"That involves a sufficient degree of intent at least to be inconsistent with inadvertence." *Rideout v. Winnebago T. Co.* 123 Wis. 297, 101 N. W. 672.

It is therefore erroneous to treat these two species of wrongs as of the same character and kind and to hold that

the acts of a person, amounting to a wilful wrong and termed "gross negligence," are the same as the wrongful acts or omissions of a person flowing from an inadvertent failure to do his duty toward another. *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663; *McClellan v. Chippewa Valley E. R. Co.* 110 Wis. 326, 85 N. W. 1018; *Rideout v. Winnebago T. Co., supra; Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 103 N. W. 271. This subject and the decisions thereon in this court have been given an exhaustive re-examination on this appeal and in the case of *Astin v. C., M. & St. P. R. Co., post,* p. 477, and as a result we are persuaded that the views expressed in former cases involving this question are correct in principle and reason and must be adhered to. We therefore hold that the court erred in awarding judgment on the verdict in the instant case, because the jury found in answer to question No. 7 that the brakeman's conduct in assisting the plaintiff on the train amounted to a want of ordinary care, and in answer to question No. 7½ characterize the same conduct as gross negligence.

The trial court considered that different inferences were permissible from the evidence on this question, resulting either in a finding that the brakeman's conduct constituted a want of ordinary care or gross negligence. This we believe is borne out by the record. But that does not justify the conclusion that it can be both ordinary negligence and gross negligence, because the same acts are not legally capable of constituting ordinary negligence and gross negligence, for the reason that acts which constitute a want of ordinary care, termed "ordinary negligence," are composed of elements and ingredients differing in nature from those which constitute a wilful wrong, termed "gross negligence," and the two are, therefore, in a legal sense, separate and distinct legal wrongs. From this it follows that the verdict as found cannot stand.

The trial court suggested that under the circumstances here presented it would probably result in hardship and prob-

able injustice to the plaintiff if she were required before trial, when she could not know the precise nature and limits of the defendant's liability, to elect whether to stand on a cause of action either for ordinary negligence or for gross negligence. The perplexity of this situation is no doubt a real one and demands that the difficulty be resolved by adopting a procedure which will enable both parties to an action to try out the controversy in such a way as to afford them protection in their rights and also afford an opportunity for redress of the wrong actually inflicted. The case of *Astin v. C., M. & St. P. R. Co., supra,* presents this question on an appeal from a ruling requiring the plaintiff to elect in advance on what cause of action he would stand, and it was there considered and held that where a person alleged that he suffered damages by the wrongful acts of another, arising out of one transaction, and he cannot know from the evidence available to prove such actionable misconduct whether it constitutes ordinary negligence or gross negligence, then the party may set out the wrongful act in appropriate form in separate counts alleging different causes of action, for the purpose of meeting the different and conflicting inferences of fact that may reasonably be drawn from the evidence adduced. Such a pleading is fully justified, for it preserves the plaintiff's rights to obtain relief for the wrong which it may be found on the trial was actually committed against him, and it operates justly to the party charged, for it fully informs him of the wrong the plaintiff seeks to redress and apprises him that the plaintiff will stand on the cause of action which the court or jury may find is established by the proof, and it enables the defendant to join issue and plead thereon his appropriate defenses. Nor will such a course involve any unusual difficulties in administration in the course of the trial. If it appears at the conclusion of the plaintiff's case or when all the evidence has been received that the evidence will not, as matter of law, sustain any one or more of the alleged causes of

action, it then devolves on the court to so hold and to submit the case made, if any, to the jury for determination under appropriate instructions. Should the evidence or the reasonable inferences therefrom be so conflicting as to require that a jury determine which of the alleged causes of action, if any, is sustained thereby, then the trial court must inform them of their duty to determine this question and require them to find which cause of action, if any, has been established. This course of procedure is a proper one within the principles enacted by the Code regulating proceedings in civil actions and tends to award a certain remedy for the wrong alleged, and prevents delays and multiplicity of actions to enforce redress for one wrong. In view of the discussion of this question and the collection of the adjudications in *Astin v. C., M. & St. P. R. Co., supra,* further elaboration is not deemed essential at this time.

We are constrained to hold that the verdict rendered in this case is uncertain and indefinite by reason of finding the defendant guilty of both ordinary negligence and gross negligence as regards an alleged wrong which could constitute but one cause of action, and that the judgment could not be awarded thereon.

If the plaintiff deems it advisable to apply to amend the complaint by adding a separate count alleging a cause of action for gross negligence the privilege should be granted.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

TIMLIN, J. In the case of *Astin v. C., M. & St. P. R. Co., post,* p. 477, it is ruled that the one wrongful transaction which caused death may be set forth by the administrator in two counts in the complaint, one charging wilful wrong or gross negligence and the other charging ordinary negligence. This seems to be expressly authorized by sec. 2647, Stats. (1898), referred to in Maxwell, Code Pl. pp. 351, 352;

Bliss, Code Pl. § 129; *Gilbert v. Loberg,* 83 Wis. 189, 53 N. W. 500; *Cleveland v. Barrows,* 59 Barb. 364. I think there is much in the opinion in this case logically inconsistent with the statute and with the *ratio decidendi* of *Astin v. C., M. & St. P. R. Co., supra.* There is nothing new or extraordinary in applying the rule of *Whitney v. C. & N. W. R. Co.* 27 Wis. 327, and the statute above referred to to negligence cases. The plaintiff was a passenger; the defendant was liable to her whether the act of the brakeman was wilful or his negligence gross or ordinary. There is here a verdict conforming to the pleadings which charged ordinary negligence and acquitting the plaintiff of contributory negligence. The trial judge on his own motion submitted and the jury found, in addition, another ground of liability not pleaded, namely, that the brakeman committed a wilful wrong upon the plaintiff or was guilty of gross negligence. The defendant would be liable to the same extent and to the same amount for this wrong as for the wrong pleaded. I think the best disposition of the case would have been to strike out or disregard as a mere unauthorized excrescence the finding of the jury to the effect that the brakeman was guilty of wilful wrong or gross negligence, because not within the issues made by the pleadings. I see no inconsistency, however, in these findings in the suit of a passenger. For each act the principal is alike responsible, and while the acts differ, perhaps, in the matter of intention as regards the brakeman, they do not at all differ as regards the defendant, his employer.

SCHWAB, Respondent, vs. SMITH, Appellant.

October 4—October 25, 1910.

Corporations: Compelling transfer of stock on the books: Affidavits.

1. In a proceeding under sec. 1752, Stats. (1898), to compel transfer of corporate stock the court may decide the matter upon the affidavits of the parties, or may receive evidence from either side.
2. An order requiring the transfer to be made, based upon affidavits, will be sustained on appeal if there was any reasonable ground for holding that appellant's affidavit did not satisfactorily meet the case made by that of the respondent.
3. An order requiring the transfer of stock is *held* proper in this case upon affidavits which justified the trial court in concluding that the certificates had been duly assigned and delivered to a *bona fide* purchaser for value, and that the secretary's refusal to make the transfer on the books was for the purpose of gaining time to commence an action against the assignor and therein to attach the stock, which he afterwards did.
4. Ordinarily the transfer of stock on the books of a corporation may be made by the secretary acting alone, even though it may be necessary for the president to join in the issuance of a new certificate.

APPEAL from an order of the circuit court for Washburn county: A. J. VINJE, Circuit Judge. *Affirmed.*

Proceedings under sec. 1752, Stats. (1898), to compel transfer of corporate stock.

The application was on affidavit of *Sallie S. Schwab,* stating these to be the facts: August 20, 1909, for a valuable consideration, *Sallie S. Schwab* purchased from J. L. Schwab fourteen shares of the capital stock of the Shell Lake Boat Company, a duly organized Wisconsin corporation, of the par value of $100 per share. He was owner thereof, held the certificate therefor, and in writing transferred it to her. On the next day, at 9:20 a. m., she tendered such certificate to *J. M. Smith,* secretary of the corporation, for cancellation and demanded a due transfer of the stock on the corporate books,

which he neglected to do, the pretense being that he could not comply till afternoon because of absence of the president. That excuse was to enable him to levy on the stock before it could be transferred, to collect a claim he had against Mr. Schwab. *Sallie S. Schwab* called on *Mr. Smith* later in the day and demanded a transfer of the stock to her on the corporate books, which he refused, informing her that it had been attached. He has ever since refused to make such transfer. The application was opposed by the affidavit of *Mr. Smith,* to this effect, so far as material: August 20, 1909, *Sallie S. Schwab,* for a good, proper, and valuable consideration, did not purchase from J. L. Schwab fourteen shares of the capital stock of the Shell Lake Boat Company, a duly organized Wisconsin corporation, said stock being of the par value of $100 each. Neither said shares of stock nor any such shares were, nor was any certificate for any such shares delivered to said *Sallie S. Schwab* before the attachment hereafter referred to. Said shares of stock were not purchased by her, nor did she pay any valuable consideration therefor. About 9 o'clock August 21, 1909, she and J. L. Schwab called on *Mr. Smith* at the bank where he was cashier, Mr. Schwab having some certificates of stock in the Shell Lake Boat Company in his hands. He said: "I want to transfer this stock to my mother." He did not state her name or show any written transfer of stock to any one, or ask to have any stock transferred on the books. The office of the Shell Lake Boat Company was about one mile from where the conversation occurred, rendering it inconvenient to then make any transfer. Mr. Schwab was then indebted to *Mr. Smith* in the sum of $226. He there offered him a certificate for three shares of the stock in settlement. *Mrs. Schwab* was present and heard all that was said and neither made any demand for a transfer of stock to her or objection to use of some of the stock by her associate to pay his personal debt. Upon the

latter going away he said: "I will see if I can't find some way in which to make you transfer it." He had the certificates in his hands from first to last and did not, at any time, tender them for cancellation or state that they had been transferred in writing, or otherwise, to *Sallie S. Schwab.* It was necessary to have the president or vice-president sign certificates of stock. The by-laws provide that certificates of stock shall only be transferred on the books of the association. Notice to that effect is indorsed on the certificates. Four o'clock after the conversation above mentioned *Mrs. Schwab* and Mr. Schwab again visited *Mr. Smith* at the bank. She had in her hand a paper which appeared to be a certificate of stock and, presumably, the one referred to before. She laid it down on the desk and said: "I demand a transfer of this stock." *Smith* informed her he could not comply because it had been attached. She did not say she owned the stock or that it had been transferred to her. They left the bank, Mr. Schwab saying no papers had been served upon him. The stock was in fact levied on before the last conversation occurred. At the time of the occurrence mentioned Mr. Schwab was, and still is, indebted to the Shell Lake Boat Company.

A copy of the officer's return to the attachment proceeding showing that the stock had been, in due form, attached as the property of J. L. Schwab in a suit by *J. M. Smith* against him, was made a part of the affidavit.

On such affidavit an order was granted requiring *J. M. Smith* to transfer the stock referred to on the books of the corporation to *Sallie S. Schwab,* upon delivery of the duly assigned certificates and to, in due form, issue and deliver a new certificate.

The cause was submitted for the appellant upon the brief of *C. H. Mead,* and for the respondent on that of *W. N. Fuller.*

Marshall, J. Sec. 1751, Stats. (1898), provides that "The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same signed by the owner of the certificate, his attorney or legal representative shall be a sufficient delivery to transfer the title as against all persons," subject to some restriction, not material to this case. Sec. 1752 provides that, upon its appearing to the court, "by affidavit or otherwise, that the secretary or other proper officer of any corporation has, upon proper demand, neglected or refused for two days to transfer on the stock books of" a "corporation any stock which it is his duty to transfer," proceedings to determine the right of the matter shall be had as indicated, and that unless the alleged defaulting officer shall satisfy the court that the stock should not be transferred, it "shall order such transfer to be made by said secretary."

It will be seen from the foregoing, in connection with the statement of facts, that respondent's affidavit required the court to cite appellant, as was done, to show cause why he should not transfer the stock, and if his affidavit did not clearly state facts justifying him in his refusal to make the transfer, the order coercing him to that end necessarily followed.

It is suggested that the affidavit on the one side was in the nature of a complaint and the affidavit upon the other in the nature of an answer, and that, since the latter put the material allegations of the former in issue, it was error for the court to decide in respondent's favor in the absence of evidence other than her affidavit.

The statute does not prescribe any method of trying such a controversy. It simply provides a method of making a case by affidavit on the one side and that it shall prevail, unless satisfactorily disproved by the adverse party. Doubtless the court was competent to decide the matter upon the affidavits or to receive evidence from either side, had any been offered,

but was not required to regard appellant's mere evasive denial as satisfactory.

The statute contemplates that the opposing affidavit shall be viewed in the nature of a pleading and as evidence as well and that the court shall weigh the probabilities appearing thereby and decide accordingly, the burden of proof being on the one refusing to transfer the stock.

Doubtless if appellant had offered to support his affidavit by evidence the court would have permitted it. He did not take that course. He submitted the case on the two affidavits.

From the foregoing it appears that the decision of the trial court must be sustained, if there was any reasonable ground for holding that appellant's affidavit did not satisfactorily meet the case made by respondent's affidavit. The allegations in the latter were positive and ample. At the very best, if the allegations of appellant's affidavit had been likewise positive and ample, there would have been merely the oath of one person opposed to that of another, with still, perhaps, some opportunity in the surrounding circumstances to hold that the showing on appellant's part was not satisfactory. But the affidavit of appellant was in fact evasive. While it contained words of denial as to some of the things having occurred, mentioned in respondent's affidavit, precisely as alleged, it left room for belief at some points, and suggested very strongly in others, that the very things referred to did occur substantially as claimed and that it was the duty of appellant to make the formal transfer of the stock on the corporate books.

The idea is conveyed by appellant's affidavit that if there were a refusal to transfer the stock, it was justifiable because he was absent from where the stock books were kept; that it was therefore not convenient to then act in the matter; and for the further reasons that the president was absent and it was necessary to have him sign the new certificate. But there is no showing that any such excuse was made to respondent.

Furthermore, though the presence of the president was necessary to issuance of a completed new certificate, it was not necessary to a transfer on the books of the corporation. A transfer is one thing, an issue of the certificate another. The secretary and the president join in the latter, but the former, ordinarily, is within the competency of the secretary to do, acting alone.

On the whole, there was ample room, it seems, from the character of appellant's affidavit, for the court to believe that the allegations of respondent's affidavit were true; that a demand for a transfer at the corporate office, where the books were at hand, was unnecessary, since appellant was bent on obstructing respondent's purpose to have the transfer made till he could secure a levy on the stock for his own private purposes.

Doubtless appellant thought that if he could obtain the levy before an actual transfer of the stock on the corporate books was made, the sale of the stock to respondent, if one had occurred, would thereby be superseded. That seems to have been his state of mind and to explain his movements consistent with everything having been done as respondent claims, entitling her to have the stock transferred.

As we have seen, when respondent obtained possession of the stock certificates for value, duly assigned to her in writing, she was the owner as against any claim of an attaching creditor of her assignor. If she had not obtained such possession before the first visit but did before the last one and prior to the attachment, that was sufficient. The mere fact that the levy antedated the second visit was not of itself any justification for refusing to make the transfer. It follows that the order appealed from must be affirmed.

By the Court.—So ordered.

VINJE, J., took no part.

NORTHERN PINE CRATING COMPANY, Respondent, vs. LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, Appellant.

October 4—October 25, 1910.

Fire insurance: Cancellation of policy: Mutual consent.

1. One party to a policy of insurance can cancel it only by strictly complying with its terms as to cancellation, unless such compliance is waived by the other party.
2. Where by the terms of a fire policy the insurer could cancel it, without the consent of the insured, only as to risks subsequent to the expiration of ten days after notice of cancellation, no cancellation by mutual consent or otherwise than in accordance with the terms of the policy was shown by a letter from an agent stating that upon instruction from the insurer he had that day canceled the policy and credited the insured with the return premium, and a reply acknowledging receipt of the notice, asking if the policy could not be rewritten in one of the agent's other companies, and asking for details of the policy.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This action was brought on an insurance policy containing the following provision:

"This policy may be canceled at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the premium remaining after deducting the customary short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice."

It is claimed by appellant that the policy was canceled by mutual consent before the fire, and whether it was canceled is the only question upon this appeal. Both parties asked for a directed verdict, and the court granted the motion of the

plaintiff and directed a verdict in its favor for $1,541.83, upon which judgment was entered and the defendant appealed.

For the appellant there was a brief by *M. H. Boutelle* and *N. H. Chase,* and oral argument by *Mr. Boutelle.*

For the respondent there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

Kerwin, J. The facts are undisputed, and the question arises whether they established a cancellation of the policy by mutual consent. It is conceded by appellant that, under the policy, ten days' notice to respondent was necessary before cancellation could be effected by it without the consent of the respondent. But it is contended that the evidence shows a cancellation otherwise than according to the terms of the policy, namely, by mutual consent. The evidence shows without dispute the execution and delivery of the policy February 28, 1909, running for one year, covering respondent's manufacturing plant at Cass Lake, Minnesota; that on May 31st appellant's state agent for Minnesota instructed the local agent of the company, one Harding, to cancel the policy in suit, at the same time making a memorandum of the instruction on the appellant's policy register kept by Harding; that on June 8, 1909, appellant wrote to Harding confirming the instructions theretofore given to Harding; that on June 19, 1909, Harding, who was cashier in the bank at Cass Lake, took the policy in question out of the bank vault where it was kept by respondent, and mailed it to appellant, and on the same day wrote respondent stating that he had been instructed to cancel the policy and had that day done so and had credited respondent's account with the return premium; that on June 23, 1909, respondent replied to Harding's letter of the 19th acknowledging receipt thereof and asking whether the policy could not be rewritten in one of Harding's other companies, and asking for details of the policy in suit; that

respondent's letter was received by Harding at Cass Lake June 24, 1909, about one hour before the fire in question occurred; that the fire resulted in a loss and damage to respondent of $10,792.84, of which appellant's prorate (if its policy were in force) would be $1,541.83; that two days subsequent to the fire Harding wrote respondent referring to his letter of the 23d received, and saying that he had not had time to make a replacement of the insurance and referring to the fact that the adjusters had arrived and that they were disappointed that respondent was not there so that an adjustment could be had at once. Appellant denied liability, and respondent made and served proof of loss.

It is clear from the established facts that the appellant could cancel the policy only in the manner provided by the policy without the consent of the respondent. But it is insisted by appellant that the undisputed facts show a cancellation by mutual consent. The correspondence between appellant and respondent, which is claimed to work an immediate cancellation of the policy by mutual consent, is perfectly consistent with cancellation according to the terms of the policy "as to all risks subsequent to the expiration of ten days from such notice." The appellant having the right to cancel only as to risks occurring subsequent to ten days after notice, the respondent was well justified upon the facts in believing that the appellant was proceeding to cancel according to the terms of the policy, and there is nothing in the correspondence or established facts showing that respondent consented to a cancellation otherwise than in accordance with the terms of the policy. *Wicks Bros. v. Scottish U. & N. Ins. Co.* 107 Wis. 606, 83 N. W. 781; *Davis L. Co. v. Hartford F. Ins. Co.* 95 Wis. 226, 70 N. W. 84. It is clear that the proceedings to cancel by appellant were adverse proceedings, not by request to respondent to cancel by consent in any manner contrary to the provisions of the policy. If the appellant desired to cancel by mutual consent so as to immediately terminate all risk

under the policy, the course pursued by the appellant was not well calculated to bring such purpose home to the knowledge of the respondent, and it cannot be said from the record that the respondent ever acquiesced in such purpose. And in the absence of knowledge brought home to the respondent that the purpose of the company was to cancel otherwise than in accordance with the terms of the policy, acquiesced in by the respondent, it must be held that the notice of cancellation was in accordance with the terms of the policy. A policy of insurance can only be canceled by one of the parties thereto by a strict compliance with its terms as to cancellation, unless such compliance is waived by the other party. *Bradshaw Bros. & Co. v. Fire Ins. Co.* 89 Minn. 334, 94 N. W. 866; 16 Cyc. 873; *Hartford F. Ins. Co. v. Tewes,* 132 Ill. App. 321.

Whether, if the policy had been returned to appellant with the consent of respondent and the return premium accepted, this would amount to a cancellation of the policy otherwise than in accordance with its terms, we need not and do not decide, because it does not appear from the record that the respondent ever accepted the return premium, or that it had knowledge that the policy was returned to appellant until after the fire. We are convinced that the policy covered the risk at the time of the fire, therefore the respondent was entitled to recover.

By the Court.—The judgment below is affirmed.

CHARRON, Appellant, vs. NORTHWESTERN FUEL COMPANY, Respondent.

October 4—October 25, 1910.

Negligence: Personal injuries: Validity of release: Separate trial of that question: Evidence: Mental capacity.

1. **In an action for personal injuries caused by negligence, when the complaint seeks to avoid the effect of a release and the answer sets up the release in bar of the action, the trial court may in its discretion try the question of release first and separately, and may assume, for the purposes of such trial, that but for the release plaintiff has a cause of action.**
2. **On the trial of such issue considerable latitude of inquiry should obtain, and evidence tending to sustain or impeach the release should not be excluded merely because it is also relevant upon the other branch of the case.**
3. **On such a trial it was error to exclude evidence tending to show the effect of plaintiff's injuries upon his mental capacity.**
4. **It was also error in such a case to limit cross-examination so as to exclude a question as to former admissions made by the witness in conflict with his testimony and tending to show the mental incapacity of plaintiff.**

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Victor Linley, for the appellant, cited, besides other cases, *Coleman v. Hunt*, 77 Wis. 263, 45 N. W. 1085; *Lusted v. C. & N. W. R. Co.* 71 Wis. 391, 36 N. W. 857; *Sheanon v. Pacific Mut. L. Ins. Co.* 83 Wis. 507, 53 N. W. 878; *Albrecht v. M. & S. R. Co.* 94 Wis. 397, 69 N. W. 63; *Jackowski v. Ill. S. Co.* 103 Wis. 448, 79 N. W. 757; *Ball v. McGeoch*, 81 Wis. 160, 51 N. W. 443; *Wickham v. South Shore L. Co.* 89 Wis. 23, 61 N. W. 287; *Gunther v. Ullrich*, 82 Wis. 222, 52 N. W. 88; *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934; *Gehl v. Milwaukee P. Co.* 116 Wis. 263, 93 N. W. 26; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Bauer v. Richter*, 103 Wis. 412, 79 N. W. 404.

For the respondent there was a brief by *Frank A. Ross,* attorney, and *Howard T. Abbott* and *Alf. E. Boyeson,* counsel, and oral argument by *Mr. Abbott.* Among other authorities, they cited *Schmitt v. N. P. R. Co.* 120 Wis. 397, 98 N. W. 202; *Brown Co. v. Van Stralen,* 45 Wis. 675; *Coggswell v. Davis,* 65 Wis. 191, 26 N. W. 557; *Bush v. Maxwell,* 79 Wis. 114, 48 N. W. 250; *Lepley v. Anderson,* 142 Wis. 668, 125 N. W. 433; *Sieber v. Amunson,* 78 Wis. 679, 47 N. W. 1126; *Hughes v. C., St. P., M. & O. R. Co.* 122 Wis. 258, 99 N. W. 897; *Johnson v. St. Paul & W. C. Co.* 126 Wis. 492, 105 N. W. 1048; *Anderson v. Chicago B. Co.* 127 Wis. 273, 106 N. W. 1077; *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231; *Zoesch v. Flambeau P. Co.* 134 Wis. 270, 114 N. W. 485.

Timlin, J. The appellant brought this action to recover for personal injuries occasioned by the negligence of defendant on May 27, 1907. In his complaint he averred the facts tending to show the negligence of the defendant and the injury to plaintiff, and further that in July, 1907, the defendant by fraud and duress obtained from the plaintiff a release in writing of this right of action, and that the plaintiff was insane at the time and wholly incompetent to make any contract whatever. He asked that the $280 received by his wife for this release be credited upon the verdict or judgment and that the release be declared null and void and canceled, and that he have judgment for his damages. The answer contained denials meeting the essential parts of the complaint, but also averred this release of July, 1907, in bar of the plaintiff's action. When the case came on for trial the circuit court ordered that the issue relating to this release be first separately tried, to which ruling the plaintiff excepted. The plaintiff assumed the affirmative on this question, and, after offering some evidence relating to the severity of his injuries and some evidence relating to his mental condition re-

sulting from such injuries, took the stand and was examined and cross-examined at great length. His testimony was to the effect that he had no recollection of any settlement made or attempted to be made, or of receiving any money, or of any persons having come there and attempted a settlement. The defendant then offered evidence of three persons who testify that they went to the plaintiff's house on July 9, 1907, found him sitting up or reclining on a bed, able to converse and take part in negotiations for a settlement, relate what was said and done, and produce a release in sufficient form whereby the plaintiff, in consideration of $280, compromised his claim against the defendant and released and discharged the defendant from all liability by reason of plaintiff's injuries; also a check or draft for $280 payable to the order of plaintiff and indorsed by plaintiff and his wife. No special verdict was requested by either party and the court submitted to the jury this question: "Was the plaintiff on the 9th day of July, 1907, mentally incompetent to make a settlement with the defendant?" The jury answered "No." Judgment went for defendant on this verdict.

There was no error in the proceedings up to this point. Perhaps the question submitted to the jury would have been clearer had the inquiry related to the competency of the plaintiff instead of to his incompetency, but this is no reversible error. It was within the discretion of the court below to try the question of release first and separately. For the purposes of trying such question it may be assumed on such trial that but for the release plaintiff had a right of action. But upon the trial of such issue the evidence should not be unduly restricted, and all competent evidence should be admitted bearing upon the question, even though it also bore upon the other question in the case not yet for trial. The general language used by COLE, C. J., in *Coleman v. Hunt*, 77 Wis. 263, 45 N. W. 1085, must be limited to the issues raised in that particular case. Those in the case at bar are

not cognate. It is difficult to ascertain and determine the scope of a former adjudication without an inquiry into the nature and details of the cause of action sought to be foreclosed thereby. It was at common law found necessary to dispose of pleas separately from purely defensive matter, and, while the technicalities of that system have been swept away, the conditions which gave rise to such technicalities are ever present in forensic controversy and must be met by some practical rule. There was no error in trying the question of release first and separately. We find no error in the instructions. There was evidence sufficient to support the verdict of the jury.

This disposes of all the errors assigned except those relating to the rulings on the evidence. It is said the court erred in refusing to admit in evidence the deposition of Mr. Gibson, the superintendent of defendant, taken under sec. 4096, Stats. (1898). The exception to the ruling excluding this deposition was well taken. The deposition should have been received had it contained anything material in the way of admissions, but we do not find that it contained anything tending to show that the plaintiff was incompetent to contract, but rather the contrary. The error was therefore not prejudicial. There was no error in refusing to admit in evidence the deposition of Dr. Spears, because the doctor was produced and examined as a witness in court. Dr. Lamson, who attended the plaintiff immediately after the injury and from thence until the 19th or 20th of June, when he left the town temporarily for ten days or more, was asked whether the symptoms present would show that the plaintiff had sustained a fracture of the skull. His evidence was excluded, apparently upon the ground that whether or not the skull was fractured was a matter of fact which an examination of the skull would disclose absolutely. This was error. The respondent contends that it was admitted that the plaintiff sustained a fracture of the skull, also proven by other physicians.

This goes to the point that the appellant was not prejudiced by the ruling. We think that under such circumstances no prejudice calling for a reversal is shown. But there were several rulings of this nature. Dr. Andrus was asked: "Can you tell what the probable effect is upon the mental condition of a person who suffers a fracture of the base of the skull?" Also: "Does a fracture at the base of the skull affect one's mind?" Also: "What do you find to be his present condition?" These questions were objected to and the objections sustained. Also on cross-examination of defendant's witness Posey he was asked: "Did you tell me this: 'His mind was weak, he talked right for a while and all at once he would go off?' " It thus appears that, after narrowing the issues by trying the question of release separately, the trial court excluded evidence bearing directly on that issue and restricted relevant cross-examination bearing directly thereon. The case presents some extraordinary features in this respect. If it could be shown that the effect of a fracture of the skull at this particular place would be to produce a loss of memory, apparent power of conversation and discernment, but at the same time marked incapacity for judgment or reflection, the evidence might be very pertinent to the issue submitted to the jury. The exact location of the fracture is not described otherwise than as at the base of the skull. No other evidence sufficient to take the place of this excluded evidence is pointed out to us. If rulings on evidence are not prejudicial when the evidence excluded goes to the very question at issue and leaves the party without evidence of the kind excluded on this very point, it is hard to imagine a case of prejudicial error. For these rulings on evidence the judgment must be reversed.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

VINJE, J., took no part.

Swalm, Respondent, vs. Northern Pacific Railway Company, Appellant.

October 4—October 25, 1910.

Railroads: Negligence: Injury to person crossing tracks: Contributory negligence: Duty to stop: Question for jury: Instructions: Harmless errors: Special verdict: Form.

1. Generally, the question whether or not it was the duty of a person driving a team to stop before attempting to cross railway tracks is one for the jury, and not one to be decided as matter of law by the court.
2. Upon the evidence in this case—tending to show, among other things, the opportunity for the driver of plaintiff's team to look and listen before crossing defendant's track; that he did look and listen, but did not stop; that the engine which struck him was running at a speed of fifteen or more miles per hour; and that no signal or warning of its approach was given—the jury were warranted in finding that the driver exercised ordinary care.
3. An instruction that ordinary care on the part of the driver would be "such a degree of care and caution, all things considered, that a reasonably prudent man would have exercised," omitting the words "under the same or similar circumstances," was not prejudicially erroneous where the standard definition of ordinary care was given in connection with a question in the special verdict dealing with the negligence of the defendant.
4. A question submitted for special verdict should not ask whether a party is "chargeable" with want of ordinary care, but whether he was "guilty" of such want.
5. The court may properly refuse to include in a special verdict a question covering a mere evidentiary fact.

Appeal from a judgment of the superior court of Douglas county: Charles Smith, Judge. *Affirmed.*

On the morning of January 5, 1909, a team of horses belonging to the plaintiff, and hitched to a sleigh, was being driven northward along a public highway known as Detroit Pier in the city of Superior, which highway crosses a series of eleven tracks of the defendant railway company, such tracks

running east and west. In approaching these tracks and before driving upon the same there is a grade on the street from south to north. The tracks are referred to in the testimony as numbers 1 to 11 inclusive, the one farthest south being designated as track No. 1, the next No. 2, and so on to No. 11, the one farthest north. It appears that on track No. 9 and about fifty-two feet east of the crossing there was a string of cars extending east; on track No. 8 and eighty-eight feet east of the crossing there was a string of cars extending east; and on track No. 8 and twenty-two feet west of the crossing there were also some cars extending west. After having passed over nine of the railway tracks and while in the act of crossing track No. 10, a locomotive of the defendant company backing westward on track No. 10 collided with said horses and sleigh. As a result of such collision one of the horses was killed, the other injured, and the sleigh and harness damaged. This action is brought to recover damages sustained by reason of such collision, plaintiff alleging that the accident was due to the careless and negligent operation of said locomotive.

By its answers to questions submitted on a special verdict the jury found in favor of the plaintiff and fixed his damages at $420. Thereafter judgment was entered in favor of the plaintiff and against the defendant, from which judgment this appeal is taken.

For the appellant there was a brief by *Hanitch & Hartley*, attorneys, and *C. W. Bunn* and *L. T. Chamberlain*, of counsel, and oral argument by *Clarence J. Hartley*.

W. P. Crawford, for the respondent.

BARNES, J. The errors assigned in this case are (1) the driver was guilty of contributory negligence as a matter of law and the court erred in refusing to so hold; (2) the court erred in the charge given to the jury and also in failing to charge upon certain points; (3) the court erred in refusing to submit a question to the jury requested by defendant.

It is not seriously contended that had the driver stopped his team before attempting to cross the tracks he could have seen the approaching engine. Generally the question of whether a person driving a team should stop or not before attempting to cross a railway track is a question for the jury and not one to be decided as a matter of law by the court. *Kujawa v. C., M. & St. P. R. Co.* 135 Wis. 562, 568, 116 N. W. 249, and cases cited. The opportunity for the driver in this case to look and listen while crossing the tracks was established. It is because of his alleged failure to exercise such opportunity that defendant contends that the court should hold that contributory negligence was so clearly established as not to be a jury question. This claim is urged upon the ground that the engine was proceeding at a speed of from four to six miles an hour only, and that it was in plain sight for a distance of ninety-eight feet before it reached the crossing upon which plaintiff's horses and sleigh were struck. This being so, it is argued that if the driver had proceeded with due care and had used his eyes he would have had ample time in which to bring his team to a standstill before reaching the track upon which the engine was moving. Five witnesses testified that the engine was not moving at a speed to exceed from four to six miles per hour. The driver testified that it was running at the rate of twenty-five or thirty miles per hour. The jury found that its speed was fifteen miles per hour. It is contended that this finding is not supported by the evidence. We think it is. The engine was running light and its brakes were in perfect order. They were set about thirty feet east of the crossing. After they were set the engine ran about 150 feet before it came to a stop, and for over 100 feet of this distance the tender was pushing or dragging the horses and sleigh along the track. The jury might well have believed that the estimates of the witnesses on both sides were wild as to the rate of speed, and the conceded facts would indicate that the jury reached an intelligent and rea-

sonable conclusion. Conceding that the finding of the jury on the question of speed should stand, the contributory negligence of the driver was plainly one for the jury. He testified that he both looked and listened and that no warning or signal was given indicating the approach of the engine, and that after he saw the engine it collided with him before he had any time to avoid the accident. There is evidence which would warrant the jury in finding that the engine could not have been seen by him at a distance of over sixty or seventy feet. It would take the engine not to exceed three to four seconds to cover this distance. The horses were well over the track when the collision occurred. This was a very short time within which to get the horses out of the zone of danger in which they were when the peril was discovered. We cannot say as a matter of law that the jury was not warranted in finding that the driver exercised ordinary care.

Error is assigned because the court refused to submit the following question to the jury: "Were the horses trotting at the time they approached the crossing?" Whether they were or not was merely an evidentiary fact bearing upon the contributory negligence of the driver, and the court very properly refused to include the question in the special verdict.

The court instructed the jury that ordinary care on the part of the driver would be "such a degree of care and caution, all things considered, that a reasonably prudent man would have exercised." The instruction is faulty because of the omission from the end thereof of the words "under the same or similar circumstances." The standard definition of ordinary care was given in connection with a question in the special verdict dealing with the negligence of the defendant. The omitted clause adds little to the definition. The error, if there was one, was technical and did the defendant no injury. *Palmer v. Schultz*, 138 Wis. 455, 120 N. W. 348.

Error is assigned because the court failed to instruct the jury as to the degree of care which a person circumstanced as

the driver was in this case should exercise in undertaking to make a crossing. No instruction was requested upon the point and error cannot be predicated on the failure of the court to instruct in the absence of a request.

The second question submitted to the jury was: "Is defendant chargeable with want of ordinary care on the occasion in question?" It may well be doubted that a finding that a defendant is *chargeable* with a want of ordinary care is equivalent to a finding that he is *guilty* of a want of ordinary care, inasmuch as the word "chargeable" imports subject to mere accusation only, as well as actual guilt. The departure from the approved form of question worked no injury in the present case and no error is predicated upon it. Cases might well arise, however, where a change in phraseology would result in more serious consequences, and it is suggested that the better and safer practice is to use the common and approved form of inquiry when submitting to the jury a question dealing with ordinary care.

By the Court.—Judgment affirmed.

HOLLAND, Respondent, vs. BARNETT & RECORD COMPANY, Appellant.

October 4—October 25, 1910.

Master and servant: Injury to servant: Defective machinery: Negligence of fellow-servant: Evidence.

1. Evidence as to the worn and defective condition of a ratchet wheel and dog on defendant's pile-driver, by reason of the slipping or premature release of which a pile fell and injured plaintiff, is *held* to sustain a finding by the jury that defendant was guilty of a want of ordinary care.
2. Upon conflicting statements by the engineer who operated the pile-driver that he could not account for the happening of the accident and that it was caused by a motion of his foot releasing the dog from the ratchet wheel, it was for the jury to say whether or not the accident was so caused.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action for personal injuries. Plaintiff's foot was crushed while putting in place a long pile that had been raised in the leads of a pile-driver and was held suspended three or four feet from the ground by means of a rope, drum, ratchet wheel, and dog. Either the dog slipped out or else it was prematurely and inadvertently released by the engineer, and the pile fell. The evidence on the part of the plaintiff tends to show that the dog slipped out by reason of its worn condition and that of the ratchet wheel. The jury found (1) that defendant was guilty of a want of ordinary care; (2) that such want of ordinary care was the proximate cause of the plaintiff's injury; and (3) that he sustained damages in the sum of $3,700. The court found there was no contributory negligence. Defendant moved to set aside each finding of the jury and the court because the same was contrary to the law and the evidence. The motion was overruled, and from a judgment on the special verdict in favor of plaintiff the defendant appealed.

For the appellant there was a brief by *Frank A. Ross,* and oral argument by *W. P. Crawford.*

Victor Linley, for the respondent.

VINJE, J. The defendant challenges the correctness of the verdict on two grounds: First, because the finding that defendant was guilty of a want of ordinary care is not sustained by the evidence; and second, because the evidence shows that the negligence of a co-employee was the proximate cause of the injury.

1. The testimony of several witnesses in behalf of the plaintiff was to the effect that the ratchet wheel was worn; that its teeth had become more or less rounded; that the tooth of the dog was straightened and rounded so that the teeth of the ratchet wheel and the tooth of the dog did not conform to each other, and, by reason thereof, the dog tended to slip out.

To rebut such testimony the defendant introduced in evidence the ratchet wheel and the dog, both of which, the evidence shows, are in the same condition now that they were in at the time plaintiff sustained his injury. After a careful examination of the appliance, adjusted as it was on the pile-driver, we have come to the conclusion that its condition confirms rather than rebuts plaintiff's testimony. The tooth of the dog, especially, is straightened and worn rounding so that when the dog is inserted the abutting faces are not at the same angle they were originally, or at the angle they should be in order to hold firmly and safely. The finding, therefore, that defendant was guilty of a want of ordinary care is sustained by the evidence.

2. By putting his foot on a friction lever the engineer could release the dog at will. If this was done while a weight was suspended, as was the pile in question, the weight would drop. The engineer who operated the appliance at the time of the injury testified, in behalf of the defendant, that he may have borne down on the friction lever and caused the dog to jump; and in answer to the question, "Then it was your motion that caused the accident?" he said "Yes." Defendant claims this testimony shows conclusively that the injury was the result of the negligence of a co-employee. Just previously, however, the engineer, in answer to this question, "Are you able yourself to account for the happening of this accident?" said, "No, I can't tell it; I can't make no account of it at all;" and in a written statement made to plaintiff's attorney before the trial he said: "I took the lever entirely off the drum, and had put the dog on the ratchet so it held. I had done my duty completely. Of course I didn't know what caused it." On the trial he explained this statement by saying he did not swear to it. On this state of the evidence it was a question for the jury to say whether the witness was to be believed when he said it was his motion that caused the accident. Their finding in favor of the plaintiff cannot be disturbed.

By the Court.—Judgment affirmed.

STATE EX REL. M. A. HANNA DOCK COMPANY, Respondent, vs. WILLCUTS, City Clerk, Appellant.

October 5—October 25, 1910.

Taxation: Assessment of property omitted in former year: Assessor testifying as to omissions: Statutes: Repeal by implication.

1. **Actual and intentional omission by the assessor to assess a part of certain property under the mistaken notion that such part was not subject to local taxation does not preclude assessment thereof in the following year as omitted property, under sec. 1059, Stats. (Laws of 1909, ch. 490), such omission not being in the nature of a judicial determination of a question of fact.**
2. **The provision of sec. 1063, Stats. (1898), that no assessor shall be allowed by his oath or testimony to contradict or impeach any affidavit or certificate made or signed by him as such assessor, is by necessary implication repealed by sec. 1059, Stats. (Laws of 1909, ch. 490), and ch. 371, Laws of 1907 (secs. 925—139, 1060, 1062, Stats.), in so far as it would interfere with performance by the assessor of the new duties imposed by the last mentioned statutes.**

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

Action to test the validity of a decision of the board of review of the city of Superior, Wisconsin.

In 1907, the assessor of Superior assessed the Pittsburgh Coal Company on account of coal on its dock, denominated railway coal. Such proceedings were taken in respect to the matter that the circuit court for Douglas county decided that the property was exempt from local taxation because of its being, in fact, owned and for use by a railway company in the operations of its road. The question at the bottom of the litigation was whether, under transactions which had occurred between the railway company and the coal company, the title to the coal yet remained in the latter, although the property was called railway coal. On appeal the judgment of the circuit court was reversed, it being thus finally decided that the real owner of the coal was the coal company.

In 1908, after the decision in the circuit court and before that on appeal, the assessor was called upon to assess such coal as the respondent had on its dock in Superior, except such as was exempt. It had, in a common mass, a large quantity of coal of the character which had been held by the circuit court, as aforesaid, exempt from local taxation, and a large quantity which was conceded to be not so exempt. The assessor estimated that the latter portion of the common mass was of the value of $66,500, and entered that amount on his roll as the value of merchants' and manufacturers' stock, assessable to respondent.

In 1909—it having been decided that coal having the status of the so-called railway coal was not owned by the railway company but was the property of the coal company and so liable to local taxation—the assessor, in making his annual assessment, assessed to respondent, as the value of the coal which was omitted as aforesaid for the year 1908, $96,000. In due course objection was made to such assessment before the board of review. Upon the hearing in that regard, respondent introduced in evidence the assessment roll for 1908, showing the assessment to respondent as aforesaid, and purporting on its face to be an assessment of all its property of the class in question, assessable for such year. In that situation it was claimed that the assessor was incompetent to testify to facts showing how he came to make the assessment for 1909 as for property omitted in 1908, because the effect thereof would be to impeach the assessment of the latter year, contrary to sec. 1063, Stats. (1898). On behalf of the assessor's position it was claimed that sec. 1059, Stats. (1898), as amended by ch. 490, Laws of 1909, requiring the assessor in making his assessment for any year to assess for each of the three preceding years any property omitted from the assessment for any of such years, and ch. 371, Laws of 1907, relieving the assessor from the duty of acting as member of the board of review, and substituting therefor the duty to

attend the meeting of the board, when desired, and submit to examination under oath, respecting his assessment, repealed sec. 1063, aforesaid, to the extent necessary for him to perform such duties. The board of review so held and the assessor, under oath, explained, in detail, substantially as before stated, how he came to make the assessment complained of. The general effect of his evidence was that in making the assessment of 1908, he estimated the number of tons of soft coal found in respondent's possession and determined that about 60,000 tons thereof was of the class which had been held by the circuit court not assessable for local taxation and assessed the remainder only, placing on account thereof upon the assessment roll $66,500 as the value of merchants' and manufacturers' stock assessable to the dock company. There was other evidence in support of the assessment, tending to show that the dock company had in its possession and assessable for 1908, the amount of coal claimed by the assessor. The dock company neglected to produce any proof to the contrary, except as aforesaid, and, in effect, refused to make any statement respecting the amount of coal it had on its dock at the time the assessment of 1908 was made.

Upon the case thus made, the objection by the dock company was overruled. The proceedings in that regard were duly carried by writ of *certiorari* to the superior court of Douglas county for review, resulting in a judgment reversing the decision of the board of review. This appeal is taken from such judgment.

For the appellant there was a brief by *R. I. Tipton* and *T. L. McIntosh,* and oral argument by *Mr. Tipton.*

For the respondent there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

MARSHALL, J. The judgment of the superior court must be reversed for reasons which very clearly require that result.

Counsel for respondent cite *Allwood v. Cowen,* 111 Ill.

481, as holding, under a similar law, that where the assessor determines a question of fact as to the value of a certain class, or certain articles of property, such determination is of a judicial nature and not subject to review by him a subsequent year, so as to permit him to make a further assessment on account of the same property upon the theory that his previous determination was too low. It is sufficient for now that we have no such case before us. If the assessor had determined in 1908, that the dock company had 80,000 tons of coal and that the assessable value thereof was $66,500, doubtless he could not have assessed to it an additional amount on account of such coal the next year, upon the pretext that the first assessment was too low. That would have been radically different than what in fact took place; an actual omission to assess the greater part of the coal upon the mistaken notion that it was not subject to local taxation. Counsel has not advanced any reason which appeals to our minds why such omitted coal was not assessable in 1909 under sec. 1059, Stats. (Laws of 1909, ch. 490).

The claim that the board of review committed jurisdictional error in overruling appellant's objection to the assessment, in face of the *prima facie* case, if there were such, against the assessment, made by introducing the roll of 1908, rests wholly on the theory that the evidence of the assessor explaining the situation was incompetent under sec. 1063, Stats. (1898). If his evidence was competent it would not be contended, for a moment, but that the board decided the question presented to it without jurisdictional error, so far as presence of evidence bearing on the question at issue was concerned.

It is conceded, as we understand it and as the fact is, that the record of the assessment of 1909, by itself, made a *prima facie* case in favor of the work of the assessor. *State ex rel. Giroux v. Lien,* 108 Wis. 316, 84 N. W. 422; *State ex rel. Heller v. Fuldner,* 109 Wis. 56, 85 N. W. 118. There

was no evidence against it except the assessment roll of 1908 which was conclusively explained in harmony with the assessment objected to, if the assessor's evidence was proper or the assessment was otherwise sustained. The oral evidence on the subject was not confined to that of the assessor, while the failure of the dock company to offer any evidence of the amount of coal it had in 1908, and refusal to make any disclosure in that regard, left it in an exceedingly weak position regardless of the assessor's evidence.

However, we cannot escape the conclusion that the statutory requirement for the assessor to assess in one year property omitted the previous year, and the one requiring him to testify under oath before the board of review respecting all matters relating to his assessment, by necessary implication, repealed sec. 1063, Stats. (1898), so far as performance of the new statutory duties would otherwise be interfered with.

There is no more familiar rule relating to the construction together of two statutes which conflict, than that, so far as they cannot reasonably be both given full effect, the later statute is to be regarded as having been intended to supersede the earlier one. *Kellogg v. Oshkosh,* 14 Wis. 623; *Bohlman v. G. B. & M. R. Co.* 40 Wis. 157; *Northwestern Mut. L. Ins. Co. v. Drown,* 51 Wis. 419, 8 N. W. 237; *Wis. Cent. R. Co. v. Cornell Univ.* 52 Wis. 537, 8 N. W. 491; *Smith v. Eau Claire,* 78 Wis. 457, 47 N. W. 830.

The decision of the board of review was unimpeachable except for jurisdictional error. *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188. The board had undoubted jurisdiction over the subject matter, by express provision of the written law. It, as clearly, had jurisdiction to decide, upon evidence produced, whether the facts existed or not rendering the assessment complained of justifiable. It had no jurisdiction to condemn the assessment without evidence to impeach it, and, as we have seen, there

was none. To have condemned it under the circumstances would have been jurisdictional error in favor of the dock company. Assuming that there was some evidence impeaching the assessment, the board had jurisdiction to sustain it, if there was any evidence which, in any reasonable view of it, justified that course. *State ex rel. Augusta v. Losby, supra.* So in any view we can take of the case, no jurisdictional error was committed by the board and its decision should have been affirmed instead of reversed.

By the Court.—The judgment of the superior court is reversed, and the cause remanded with directions to enter judgment affirming the decision of the board of review.

McKillop, Appellant, vs. Superior Shipbuilding Company, imp., Respondent.

October 5—October 25, 1910.

Master and servant: Injury caused by negligence of fellow-servant.

1. The question whether or not employees of a common master are fellow-servants does not depend upon the rank or grade of the negligent servant, but upon the nature or character of the act in the performance of which the injury was incurred.
2. A pile-driver crew and their foreman engaged in the common employment of taking down and removing a pile-driver were fellow-servants so that the employer was not liable for an injury to one of the crew caused by the foreman's negligence in preparing the pile-driver for removal by loosening certain fastenings in such a way that the pile-driver or a part of it was likely to fall, although the injured workman did not know of the insufficiency of the fastenings and was assured by the foreman that there was no danger,—the details of the work being as obvious to him as to the foreman. *Holloway v. H. W. Johns-Manville Co.* 135 Wis. 629, distinguished.

Appeal from a judgment of the circuit court for Douglas county: A. J. Vinje, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries. The allegations of the complaint so far as material here are: That the defendant *Superior Shipbuilding Company* now is, and that during all of the times hereinafter mentioned it has been, a corporation duly organized and existing under and pursuant to the laws of the state of Wisconsin, with its principal office and place of business in the city of Superior, county and state aforesaid; that, among other things, its business, during all of said times, consisted in building, constructing, overhauling, and repairing ships, sailing vessels, and other water craft; that, in connection with its business, it at all times owned, maintained, operated, and used large shops, factories, and the usual tools and appliances in connection therewith, situate in said city of Superior; that among other appliances, during said times, it owned, maintained, and used and operated what is commonly known as a swing pile-driver in said city and its works, consisting of a foundation, constructed of wood and iron, so constructed as to turn upon a central point or pivot, and of an upright structure of considerable height, in which worked and operated the weight known as the driver, and of two upright bents, each of which consisted of two upright timbers, each about one foot square and about twelve feet high and about eight feet apart, with a cross timber or cap connecting the two upright timbers, each about twelve inches square and eight feet long, which timbers were fastened to said foundation in said upright position, and in connection with and as a part of said swing pile-driver was an engine with which the weight was raised and lowered; that on the 7th day of November, 1908, plaintiff was in the employ of the defendant company for hire as a laborer, being one of the pile-driving crew herein referred to, engaged in the performance of his duties at defendant's works in said city of Superior; that on said date and for a long time immediately prior thereto the defendant William Bennett was in the employ of said defendant company as foreman of the crew

engaged in the work of operating said pile-driver and driving piles with the same, and that said defendant Bennett at all times had full authority over said crew at said place, to whose orders and directions said crew were at all times subject; that on said 7th day of November, 1908, the defendants, through said Bennett and crew, were engaged in taking apart and taking down and removing said swing pile-driver; that on said 7th day of November, 1908, at about half-past 11 o'clock in the forenoon, the defendant Bennett and said crew were engaged in the work of removing from its position one of said two bents; that the other bent was then and there in its position, standing erect upon said foundation, and that the bent which the defendants were then and there removing was, when the plaintiff was ordered by the defendant Bennett to assist in said work, standing erect and in said position, but that the fastenings holding the same in position had been removed preparatory to lowering the same, by means of ropes and appliances, from its position down to the ground; that the defendant Bennett, and before plaintiff was ordered by the foreman to do the work hereinafter described, without any notice to or knowledge on the part of plaintiff of such facts, had also removed the fastenings holding said other bent in position, so that said bent was likely to fall and injure plaintiff or any other employee working near the same unless said bent was or had been securely fastened in said position while said other bent was being lowered, all of which facts were well known to defendant Bennett and none of which were known to the plaintiff, and that the plaintiff did not have any means or knowledge of ascertaining such facts, and that the defendant Bennett did not give him any notice or warning of such conditions; that with said bent securely fastened, then the work of lowering and removing the bent which was being lowered and removed at the time of the accident was safe and free from any danger; that the defendant Bennett, prior to the time plaintiff was ordered to do the work here-

inafter referred to, had looped a rope around the cap or cross-piece of the bent that was not being lowered, and had tied one end of such rope to the foundation of said swing pile-driver, at a point near the bent that was to be lowered, and had fastened the other end of the rope in a similar position on the opposite side of said bent, and that the said defendant had then and there carelessly, negligently, and wrongfully failed to tie or fasten said rope to said cap or cross-piece so as to prevent said bent falling or being moved from its position, and had carelessly, negligently, and wrongfully so looped said rope over said cross-piece or cap or had placed the same in said position in such manner that it would not hold and could not hold said bent in its position, and had carelessly, negligently, and wrongfully left the same standing without any fastening or anything holding the same so as to prevent the same falling, all of which facts were well known to the defendant Bennett and none of which were known to the plaintiff, and that the plaintiff did not have any means of ascertaining such facts; that the defendant Bennett, before calling plaintiff to assist in lowering said bent, had fastened a rope to the cross-piece or cap of the bent to be lowered, and had caused the same to be extended therefrom across the top of the cap or cross-piece of said other bent, and then had passed said rope down and beyond said second bent and fastened the same to the drum of the engine for the purpose of enabling an employee of the defendant company to hold said rope around said drum and to slack it away or loosen it as said bent was being lowered down and away; that said rope as so placed, and as soon as the defendant Bennett started to lower said bent, necessarily would press against the top of the bent not being lowered, and necessarily pressed against the top of said bent and tended to press or push said bent towards the one being lowered; that such pressure would not endanger said bent falling had it been tied with reasonable care in a secure position or had the fastenings not been removed there-

from before attempting to lower said bent, but that in the position and condition in which said bent had been placed and was left by the defendant Bennett the pressure of said rope was sure to cause said bent to fall and injure plaintiff or other employees while engaged in the work hereinafter described, all of which facts were well known to the defendant Bennett and none of which were known to plaintiff, and that plaintiff did not have any means of knowing of the conditions as hereinbefore described, save and except he knew that said rope extended over the top of said bent and would press against the same in the lowering of the bent which was being lowered, but that the plaintiff believed and had every reason to believe that said bent not being removed was securely fastened in the position it occupied; that thereupon the defendant Bennett called plaintiff from other work which he was doing, not connected with the lowering of said bent or the securing of such bent in position, and ordered and directed him to stand at the bottom of the bent being lowered and hold the bottom of one of said upright timbers so as to prevent its slipping from position or back towards said other bent while said bent was being lowered, and that the defendant Bennett thereupon, and after plaintiff had taken said position, proceeded to let out said rope from around said drum by and through an employee and proceeded to lower said bent down and away from said other bent not being lowered; that the plaintiff, just as the said bent was about to be lowered and while he was in said position, was assured by said defendant Bennett that said other bent was securely fastened and that there was no danger of its falling upon said rope being pressed against said cap or top, and that the plaintiff relied upon such assurance and believed the same to be true, and in the due and proper performance of his work turned his back to said bent and faced the bent that was being lowered and engaged in the performance of his duties to which he was assigned; that immediately when said rope pressed against

the top of said cap or said other bent, and solely on account of the fact that it was not securely fastened and was loose, said bent immediately started to fall and did fall towards plaintiff, striking him on the back and back of his neck and head with fearful force and violence, knocking him down and crushing and injuring him as hereinafter described, and that the sole cause of said accident and injuries was the careless, negligent, and wrongful acts and omissions of the defendants as hereinbefore set forth.

After a witness had been sworn and plaintiff was about to proceed with his case, the defendant objected to any evidence under the complaint on the ground that it appeared upon the face thereof that it did not state facts sufficient to constitute a cause of action against the defendant *Superior Shipbuilding Company,* which objection was sustained. Thereafter judgment was entered in favor of the defendant *Superior Shipbuilding Company* and against the plaintiff dismissing the complaint, from which judgment this appeal was taken.

The cause was submitted for the appellant on the brief of *Henry C. Wilson* and *Samuel A. Anderson,* and for the respondent on that of *Frank A. Ross.*

KERWIN, J. The question involved upon this appeal is whether the complaint states a cause of action against the defendant *Superior Shipbuilding Company.* This question turns on whether the injuries received by plaintiff were caused by the negligence of a fellow-servant of the plaintiff. We have set out in the statement of facts the material allegations charging negligence and need not repeat them here. From these allegations it appears that the plaintiff and defendant Bennett were engaged in the common employment of removing the pile-driver at the time of the accident, the defendant Bennett being foreman, and plaintiff one of the crew so engaged, and that through the negligence of defendant Bennett a part of the pile-driver fell and injured plaintiff.

True, it is alleged that defendant Bennett negligently prepared the pile-driver for removal by loosening certain fastenings holding the same in position so that said pile-driver or a part thereof was likely to fall, which facts were known to defendant Bennett but were unknown to plaintiff, and that plaintiff had no means of knowledge thereof, and was assured by defendant Bennett that the bent, or part which fell, was securely fastened, whereas it was not, in consequence of which it fell and caused the injury. The complaint expressly alleged a common employment, namely, that defendant Bennett and his crew, of which plaintiff was one, were at the time of the accident engaged in removing the pile-driver or a bent thereof. So we cannot escape the conclusion that the negligence of defendant Bennett that caused the injury was the negligence of a fellow-servant of the plaintiff. The loosening of the fastenings preparatory to taking down the pile-driver was a mere detail of the work in which defendant Bennett and plaintiff were engaged when the accident occurred which caused the injury. The instant case is quite analogous to *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269. In that case the foreman and plaintiff were engaged with others in building a tank. Plaintiff was under the supervision of the foreman. At the time of the accident plaintiff was engaged in the line of his duty in helping to raise the tank. The hoisting apparatus provided for raising the bents consisted of a windlass, three tackle blocks, two ropes, the tank itself, and an anchor post set in the ground sixty feet distant from the tank, opposite to and in line with the bents. After the tank had been raised a few feet, the anchor post, which had been sunk in the ground, suddenly pulled out and the bent fell, causing the injury. The jury found that the foreman was negligent in setting the anchor post, and it was held that such negligence was the negligence of a fellow-servant of plaintiff engaged in a common employment, therefore plaintiff could not recover. See, also, *Gereg*

v. Milwaukee G. L. Co. 128 Wis. 35, 107 N. W. 289. No claim is made in the complaint that defendant failed to furnish suitable and safe machinery and appliances or that defendant Bennett was incompetent. As has often been ruled by this court, whether employees are fellow-servants does not depend upon the rank or grade of the negligent servant, but "upon the nature or character of the act in the performance of which the injury was incurred." *Dwyer v. Am. Exp. Co.* 82 Wis. 307, 52 N. W. 304; *Stutz v. Armour,* 84 Wis. 623, 54 N. W. 1000; *Wiskie v. Montello G. Co.* 111 Wis. 443, 87 N. W. 461; *Okonski v. Pennsylvania & O. F. Co.* 114 Wis. 448, 90 N. W. 429.

The plaintiff relies upon several decisions of this court, and mainly upon *Holloway v. H. W. Johns-Manville Co.* 135 Wis. 629, 116 N. W. 635. It is true that the *Holloway Case* is quite similar in many respects to the case now before us, but we believe it is distinguishable. In that case the boiler was prepared by the night crew. The plaintiff had no connection with the blowing off and preparing of the boiler for cleaning. He came to the spot in the morning to clean the boiler as he was directed to do. Mere outside inspection would not disclose that it was not thoroughly cooled. The superior officer ordered plaintiff to go to work in the boiler at once, assuring him that it had been tested and was cool enough. It is true that in the case before us it is alleged that Bennett assured plaintiff there was no danger, and that plaintiff did not know the danger, but plaintiff was engaged with Bennett in the act of taking down the pile-driver and in position to observe the details of the work, which must have been as obvious to him as to the defendant Bennett. We are also cited to *Rankel v. Buckstaff-Edwards Co.* 138 Wis. 442, 120 N. W. 269; *Grams v. C. Reiss C. Co.* 125 Wis. 1, 102 N. W. 586; *Sparling v. U. S. S. Co.* 136 Wis. 509, 117 N. W. 1055; *Halwas v. Am. G. Co.* 141 Wis. 127, 123 N. W. 789, and some other cases. We shall not discuss these cases, but

simply say that we do not regard them controlling here, or out of harmony with the conclusions reached in the instant case. The court is of opinion that the complaint does not state a cause of action against the defendant *Superior Shipbuilding Company,* and therefore the judgment of the court below must be affirmed.

By the Court.—The judgment below is affirmed.

Vinje, J., took no part.

Buggs, Respondent, vs. Rock County Sugar Company, Appellant.

October 5—October 25, 1910.

Master and servant: Injury to servant: Explosion of gas: Negligence of master: Evidence: Sufficiency: Release: Competency to contract.

1. In an action for personal injuries to an employee in defendant's sugar factory, upon evidence tending to show that chemicals which had recently been used in cleaning the sugar evaporators would, when in contact with the iron of which such evaporators were largely made, generate therein a dangerously explosive gas; that this fact was or should have been known to defendant; that it was customary after such chemical treatment to withdraw the gases from the evaporators by means of an air pump, but that this had not been done at the time in question; that while plaintiff was engaged in repairing one of the evaporators an explosion took place by which it was blown to pieces and plaintiff injured; and that there was no negligence on the part of plaintiff or of any fellow-servant,—the jury were justified in finding that defendant was negligent in permitting the explosive gas to be and remain in the evaporator.
2. From the fact that an explosion took place under such circumstances the jury were authorized to infer that it was an explosion of gas and that it was preceded by ignition or any of the ordinary causes of explosion.

3. It was not essential to the liability of defendant that the cause of ignition should be shown so long as it appeared that it was not caused by any negligence of the plaintiff.
4. Evidence that the sum paid to plaintiff in consideration of a release of his claim was very small; that the settlement was improvident; that the release was signed ten days after plaintiff had received severe cranial injuries and while he was at the hospital without counsel; that he was incompetent to contract a few days prior to such signing and was also incompetent ten days thereafter and so continued for several weeks; and that he had lost all recollection of what took place at the hospital,—was sufficient to sustain a finding by the jury that at the time of signing the release plaintiff was incompetent to contract.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Jeffris, Mouat, Smith & Avery,* and oral argument by *M. G. Jeffris* and *L. A. Avery.* Among other authorities, they cited *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833; *Jackowski v. Ill. S. Co.* 103 Wis. 448, 79 N. W. 757; *German Bank v. Muth,* 96 Wis. 342, 71 N. W. 361; *Schiefelbein v. Fidelity & C. Co.* 139 Wis. 612, 120 N. W. 398; *Steffen v. Supreme Assembly,* 130 Wis. 485, 110 N. W. 401; *Kowalke v. Milwaukee E. R. & L. Co.* 103 Wis. 472, 79 N. W. 762; *Chafin Will Case,* 32 Wis. 557; *Will of Silverthorn,* 68 Wis. 372, 32 N. W. 287; *McMaster v. Scriven,* 85 Wis. 162, 55 N. W. 149; *Cutler v. Cutler,* 103 Wis. 258, 79 N. W. 240; *Gavitt v. Moulton,* 119 Wis. 35, 96 N. W. 395; *Trieloff v. Muellenschlader,* 128 Wis. 364, 107 N. W. 652; *Henderson v. McGregor,* 30 Wis. 78.

J. J. Cunningham, attorney, and *William Ruger,* of counsel, for the respondent (brief by *Mr. Ruger*), cited, besides other cases: *Kirst v. M., L. S. & W. R. Co.* 46 Wis. 489, 1 N. W. 89; *Cummings v. Nat. F. Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Spille v. Wis. B. & I. Co.* 105 Wis. 340, 81 N. W. 397; *Lipsky v. C. Reiss C. Co.* 136 Wis. 307, 117 N. W. 803; *Oberndorfer v. Pabst,* 100 Wis. 505, 76 N. W.

338; *Smith v. Smith,* 60 Wis. 329, 19 N. W. 47; *Henrizi v. Kehr,* 90 Wis. 344, 63 N. W. 285; *Blohowak v. Grochoski,* 119 Wis. 189, 96 N. W. 551; *O'Brien v. C. & N. W. R. Co.* 92 Wis. 340, 66 N. W. 363; *Maxon v. Gates,* 136 Wis. 270, 116 N. W. 758; *Ferguson v. Truax,* 136 Wis. 637, 118 N. W. 251; *Schultz v. C. & N. W. R. Co.* 44 Wis. 638; *Watkins v. Brant,* 46 Wis. 419, 1 N. W. 82; *Voell v. Kelly,* 64 Wis. 504, 25 N. W. 536; *Bussian v. M., L. S. & W. R. Co.* 56 Wis. 325, 14 N. W. 452; *Sheanon v. Pacific Mut. L. Ins. Co.* 83 Wis. 507, 53 N. W. 878; *Lord v. Am. Mut. Acc. Asso.* 89 Wis. 19, 61 N. W. 293; *Mensforth v. Chicago B. Co.* 142 Wis. 546, 126 N. W. 41; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571.

Timlin, J. In this action for personal injury the defendant was charged in the complaint with negligence causing such injury, consisting of carelessly managing and operating an evaporator in a sugar factory so that a large amount of explosive gas was generated and confined therein until the same exploded; also negligently setting the plaintiff to work on the generator without warning or instructing him of the presence of such gas, the liability of the generation of such gas, or the dangers incident to his work. The jury found the defendant guilty of negligence in caring for and managing the evaporator which exploded, the plaintiff free from contributory negligence, and that the negligence of the defendant was the proximate cause of plaintiff's injuries. On this appeal the defendant contends that a nonsuit should have been granted, that there is not sufficient evidence to support the verdict, and that there was an accord and satisfaction shown. A motion for a new trial on the part of defendant was made and overruled and this ruling is also assigned as error.

On September 20, 1907, the defendant corporation, preparing its factory to begin for the ensuing season the manufacture of beet sugar, had in the main building of its factory

on the second floor in front of the entrance a battery of four large evaporators. These large evaporators were about fifteen feet long, seven feet wide, and twelve feet high to the top of the dome. They were made of a shell of cast iron about seven-eighths of an inch thick, had wood casing on the outside and a hollow interior in which were numerous brass tubes of about one inch diameter passing lengthwise through the evaporator and connecting with a steam chest at the end. In operation these steam chests and brass tubes contained live steam. The remaining portion of the interior space in the evaporator is called the juice chamber, and in operation is partially filled with prepared beet juice which is vaporized by heat from the steam in the brass tubes and steam chest. To facilitate this operation and cause the beet juice to boil at a lower temperature, an air pump operated by steam from the boiler room some distance away is connected with that part of the juice chamber above the beet juice. By action of this air pump the superincumbent air is exhausted and the juice is consequently boiled or vaporized in a vacuum. In order to have this vacuum the juice chamber must, of course, be air tight at every point. In this operation sediment forms in these evaporators and on the outside of the steam tubes. This sediment, according to the witness Professor Kahlenberg, consists of various salts of calcium, oxalated calcium, silicate of calcium, and other more complicated salts which form a hard crust on the tubes in the evaporator. This crust, by reason of its minor conductivity for heat, retards or prevents the operation of the evaporator. It is necessary to remove this crust. The usual method is to put a quantity of soda into the juice chamber, pour in water, and boil this mixture, which has the effect, by combination with the crust on the tubes or in the evaporator, to change it to calcium carbonate. A weak solution of muriatic acid and water is thereafter poured into the juice chamber and thereby a soluble salt known as chloride of calcium is formed, which is thereafter washed away

with water. Carbonic acid gas is liberated in this process and hydrogen gas is generated from the contact of the solution of muriatic acid in water with the iron and perhaps other metals in the interior of the evaporator. This hydrogen gas is explosive by ignition when mixed with air. It is also exploded by a high degree of heat. Whether it may be exploded by detonation is not shown, and so far as we know is not sufficiently established as a scientific fact for this court to take judicial notice thereof. Hydrogen gas is perhaps the lightest known gas, lighter than air, consequently will ascend, but has the property of diffusion common to all gases, and when first generated would remain at or toward the top of this juice chamber, but would diffuse downward and mix with the air.

Beginning two or three days prior to September 20, 1907, the defendant was engaged in cleaning the evaporators in question by this chemical process or some modification thereof. The evidence seems to show that the soda, muriatic acid, and water were all put in together, and to fail to show whether or not this mixture was boiled. The plaintiff began carrying soda and muriatic acid, put some into other evaporators, but did not put any into that by the explosion of which he was injured. There was competent and sufficient evidence, however, for the jury to infer that all the evaporators were cleaned and that all were treated alike, and that all were washed out with water after the process mentioned. But there was no steam on at the time of the explosion. After the acid was in, covers were put on the manholes and the interior made tight, apparently. A glass gauge on the side of each evaporator, connected with the juice chamber at the top and at the bottom and about three feet long, was in use. It does not clearly appear whether this connected at all times with the interior of the evaporator or whether there was a shut-off. After repairing the glass indicator on evaporator No. 2 it was found necessary to repair the same device on evaporator

No. 3. The plaintiff was in the machine shop and received instructions to fit up what he calls a "nipple" for this indicator on evaporator No. 3 by cutting one out of a pipe about eight or ten inches in length and putting a screw thread on it. Having this nipple prepared, plaintiff and one Berger went to put it on the evaporator, taking with them a pipe wrench. It was to be inserted into evaporator No. 3 about ten inches from the bottom. The old nipple that had been in there was out, and there were some screw threads left in the place the old nipple was taken from—that is, the opening in the side of the evaporator into which this nipple was screwed. Plaintiff started to insert with the wrench the new nipple into this opening and it went in very hard. He used both hands on the wrench, and while he was doing this an explosion took place by which evaporator No. 3 was blown to pieces, Berger was killed, and the plaintiff severely injured.

From the foregoing it will be seen that this chemical process of cleaning the interior of the evaporator is an ordinary and well known process, no doubt subject to modifications in detail in particular plants. That dangerous explosive gases are thereby generated is or ought to be well known to those employing such methods. Professor Kahlenberg testifies: "It is absolutely certain that hydrogen will be formed when this solution of acid is in contact with iron. There is never any circumstances or any time when it will not form when so in contact." Doubtless conditions may exist in the interior of the generator or modifications of the chemical method of cleaning may be employed which will greatly facilitate the formation of this gas and increase the volume of gas formed and the rapidity with which it is formed. When conditions exist which cause the transformation of solid or liquid matter into aeriform matter within a confined space, there may be a bursting of the container without a true explosion. This is sometimes popularly called an explosion, as in the case of a steam boiler, a wine cask, or a wine bottle bursting. A jury

would be unable to say that this occurred in the instant case, because it appears that there was an opening for the insertion of the nipple into the interior of the juice chamber in which the gas was generated or was in process of generation. This, if true, would negative mere bursting. Real explosions are caused by heat, ignition, or detonation. These words sufficiently describe causes and processes. No sufficient evidence of heat to the required degree to cause explosion is shown. No evidence of actual ignition or of detonation is produced. Ignition of certain substances results from friction. The friction is shown to have occurred, but the presence of those substances which may be ignited by friction is not shown. But the fact of explosion is evidence from which the occurrence of either cause not negatived by evidence may be inferred by the jury. The explosion is *prima facie* evidence that there was ignition or detonation, because these are the remaining causes of explosions. We have to deal here with a matter of circumstantial evidence. That the explosion was caused by the negligence of a fellow-servant is negatived. The explosion was of course instantaneous. What was done by all the servants engaged in the work is detailed and described, and nothing contrary to the usual procedure was done by either to cause or produce the explosion. The negligence of the master did not consist in causing the explosion. The negligence of the master consisted in producing and permitting to remain in the generator this dangerous gas, at any moment liable to explosion from either of the causes mentioned. The friction of screwing in the nipple might cause ignition, especially if there was grit of some kind in the socket.

We conclude that there was evidence from which the jury might find that the defendant was negligent in allowing this explosive gas to be and remain in the generator while the plaintiff was working upon and repairing the generator. The defendant seems to have taken no pains to ascertain

whether or not this gas had formed and remained in the generator. It has offered no evidence to rebut the natural inference from the explosion. It is said that the interior of the generator, described as the juice chamber, was washed out with water after the muriatic acid had been poured in. The evidence is very meager on this point. If the whole cavity was filled with water, that would necessarily exclude or drive out the gas; if not, but the water was merely run through at the bottom of the juice chamber, it would have no such effect. If the water is not run through in sufficient quantity to wash away all the acid and to check the formation of gas which had already begun, it would have no such effect. The evidence does not establish the extent or the effect of this washing, and the evidence does establish, from the fact of explosion, that the gas was there after the water was run through. There is no evidence that on these particular generators there existed any devices, other than the air pump, to relieve the generator of the gases likely to be formed in this process of cleaning, nor that the plaintiff or his fellow workmen knew aught about the generation of gases produced by this process. There is also evidence tending to show that it is customary, after this chemical treatment, to start up the air pump, and by the operation of this pump withdraw all gases from the interior of the evaporator; and this was not done at the time in question. It is not shown nor can it be inferred that it was the duty of the plaintiff or his fellow-servant to start this pump. We conclude that the question of defendant's negligence upon these facts was for the jury.

After the explosion the plaintiff was found lying between the evaporators under a large piece of iron and he was unconscious. When Dr. Gibson arrived at the factory, shortly after the time of the accident, he found Dr. Edden there and found the plaintiff lying on a table or bench unconscious, Dr. Edden working at him trying to stop hemorrhage. They dressed his wound, took out a piece of the malar bone

near the left eye, opened up the wound, bandaged his head, and took him to the hospital. Dr. Gibson with Dr. Edden attended him then for a period of about ten days. He testifies that he never tried to see how much mental ability the plaintiff had during this time,—it wasn't a proper thing for one to do to a man in that condition. The plaintiff himself testifies that he has no recollection of being at the hospital at all, nor of anything that took place there. The brother and sister of the plaintiff who visited him at the hospital described his condition while at the hospital and after his return to his sister's house. His sister who visited him at the hospital was permitted to see him for the first time five or six days after the explosion, and she went to the hospital every day afterward while the plaintiff was there except two days. When she first saw him he could not see her. He had little strength, and for two weeks after he got home he moaned and showed signs of agony. Immediately upon his return home they had to repeat things over to him, and he would say he didn't know what was said or understand what they were saying. Dr. Pember, who first treated the plaintiff on the 10th of October, found a fracture of the upper part of the malar bone with the removal of part of it, and an inflammation that extended to all parts of the left eye and destroyed the eye. On October 10th, according to this witness, the plaintiff was dazed, stupid, and did not comprehend well. His mind worked slowly, his physical condition was bad, his face was emaciated, and his eye red, inflamed, and very painful. The doctor also testified that for two or three weeks after he first had charge of the plaintiff the latter did not have perception, memory, and judgment enough to transact important business. The plaintiff was confined to his bed at the hospital until September 28th. On September 29th or 30th his brother brought him some clothes, and from that time he walked around in the hall and out of doors for a few days. On the 1st of October he said to Dr. Edden, who was present

attending him as physician employed by the defendant, that he wanted to leave the hospital, did not like it there and wanted to go home, and wanted to get his brother because he had no money to pay the hospital fees. The doctor suggested that the defendant would pay his hospital fees. After some consultation he asked the doctor whether he could see Mr. Osburn, the defendant's superintendent, because he wanted to leave the hospital, did not want to stay there any longer, wanted to go home. Doctor Edden was evidently in communication with Mr. Osburn, because on October 1st Mr. Osburn and Dr. Edden together visited the plaintiff at the hospital. Mr. Osburn had a release prepared before he left his office, the plaintiff signed it at the hospital in their presence on October 1st, and by this release, in consideration of $24.50 and in consideration of the payment by the defendant of the hospital bill and the doctors' bills, he acknowledged receipt in full and discharged the defendant from all claims and demands of every kind and nature up to date and which might thereafter result from any injuries theretofore received. On September 24th the plaintiff was visited at the hospital by Dr. Edden and an attorney for the defendant and a stenographer and questioned, and his questions and answers reduced to writing. Doctor Edden and Mr. Osburn also testify to the effect that the plaintiff was in possession of his faculties when he signed the release, and there is much evidence to that effect which we need not consider in a case like this where the inquiry is whether there was sufficient evidence to the contrary to support the verdict.

Upon this showing it was a question for the jury whether or not the plaintiff, at the time he executed the release, was in possession of sufficient intelligence and mental capacity to comprehend the nature and import of his act. The evidence is direct and positive that for some time after the injury plaintiff had no such capacity. It is also direct and positive to the effect that on October 10th and continually for several

weeks thereafter, plaintiff had no such capacity. The sum paid was insignificant as compared with his injuries, and the settlement was improvident, and the defendant testifies that he has no recollection concerning it. All these are evidentiary facts which the jury was at liberty to consider. The answers of the witness to the defendant's attorney on September 24th as taken down by the stenographer also contain some evidence bearing upon his mental capacity. It is not to our minds so conclusive as it appears to appellant's counsel. At the time of the release plaintiff was at the disadvantage, resulting from his weakness and injuries and without counsel. In order to find him competent we must disregard the foregoing facts and discredit the opinions of Drs. Pember and Gibson, or assume that the plaintiff had a recovery between September 23d and October 10th in the nature of a lucid interval in which he was competent to contract. We cannot disturb the verdict of the jury under such circumstances. It follows that the judgment of the circuit court should be affirmed.

By the Court.—Judgment affirmed.

Winslow, C. J., and Marshall, J., dissent.

Rogers, by guardian *ad litem*, Appellant, vs. Brown, Respondent.

October 5—October 25, 1910.

Changing finding by jury: Appeal: Negligence: Automobiles.

1. A decision of the trial court changing a jury's finding upon a question of negligence is entitled to great weight and should not be disturbed on appeal unless clearly erroneous.
2. In an action for injuries sustained by a boy in a collision with an automobile which defendant was driving not faster than six miles per hour, the evidence—consisting of the testimony of

several eye-witnesses and the physical fact of a dent in the side of the fender—that the boy while playing with others and looking backward ran into the side of the machine, is *held* so strong and convincing, as against the boy's own testimony that he had stopped and was standing in the street looking backward when he was struck, that this court should not disturb the decision of the trial court setting aside a finding of the jury that defendant was negligent.

APPEAL from a judgment of the circuit court for Jefferson county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This is an action brought by the plaintiff, *Floyd Rogers,* an infant, by his guardian, to recover damages for injuries sustained by reason of the alleged negligence of the defendant in running and operating an automobile in the city of Fort Atkinson about the hour of 7:45 on the evening of June 27, 1909.

By its answers to five questions submitted on a special verdict the jury found (1) that plaintiff was injured by coming in contact with an automobile driven by the defendant at the above time and place; (2) that defendant was guilty of want of ordinary care in the driving and management of said automobile; (3) that such want of ordinary care on the part of the defendant was the proximate cause of the injury to plaintiff; (4) that plaintiff was not guilty of any want of ordinary care which contributed to produce the injury; and (5) that plaintiff was entitled to compensatory damages in the sum of $2,500.

Thereafter, upon motion of the defendant, the court changed the answers to the second and fourth questions of the special verdict, struck out the answer to the third question, denied the motion of plaintiff for judgment upon the special verdict as rendered, and ordered that defendant have judgment upon such verdict as amended. From a judgment dismissing the action plaintiff appeals.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

For the respondent there was a brief by *Webb & Tratt,*

attorneys, and *R. B. Kirkland,* of counsel, and oral argument by *Mr. Paul H. Tratt* and *Mr. Kirkland.*

Barnes, J. Two questions are involved on this appeal: (1) Did the court err in setting aside the finding of the jury holding that defendant was guilty of negligence. (2) Did the court err in setting aside the finding of the jury acquitting the plaintiff of contributory negligence and in deciding as a matter of law that plaintiff was negligent? The conclusion reached on the first question obviates the necessity of considering the second.

The defendant was proceeding south on Main street, one of the principal business streets of Fort Atkinson, at a speed not exceeding six miles per hour, running his machine about ten or twelve feet distant from the sidewalk on the west side of the street. Main street is intersected by South Water street, which runs east and west. There was a water trough on the north side of South Water street about fifteen feet west of the west line of Main street. The plaintiff and some other boys were playing around the trough on the evening of the accident and were throwing water on each other. Kenneth Rankin, one of the boys present, dared the plaintiff to throw water on him. The challenge was accepted, and immediately after throwing the water the plaintiff started to run, crossing diagonally in a southeasterly direction over a portion of South Water street and proceeding into Main street. The Rankin boy ran after plaintiff, but discontinued his pursuit at about the west line of Main street. The plaintiff collided with the automobile close to the crosswalk on the south side of West Water street and about ten or twelve feet east of the east line of the west sidewalk on Main street.

Five eye-witnesses testified in behalf of the defendant, all of whom said that the boy ran into the side of the machine while he was looking backward over his right shoulder. There was a dent in the fender over the right front wheel of

the automobile, near where the same is bolted to the running board, which the defendant testified was not there before the collision occurred. The defendant and one other witness testified that this dent was at or very close to the place where plaintiff struck the machine. The other three witnesses did not specify the precise part of the side of the machine which plaintiff struck. The defendant further testified that when he saw the boy the latter was running and was only about three feet from the machine, and that the collision occurred almost instantly thereafter and before he could in any way avoid it.

Three witnesses testified on behalf of the plaintiff, aside from himself, who said that they saw him run out into Main street and stop and look back over his right shoulder. None of these witnesses saw the collision, and it was the opinion of the trial court that this testimony in no way negatived or put in issue the evidence of the witnesses for the defendant to the effect that at the time of the collision the boy was in fact running. The plaintiff testified that he did not look back until after he came to a full stop, and that it was while he was standing looking backward he was hit. Whether or not the boy was standing in the street sufficiently long so that the defendant in the exercise of ordinary care could have seen him in time to have avoided the accident was a material inquiry in ascertaining whether or not the defendant was negligent. If such was not the case, then there was no evidence even tending to show negligence on his part.

Can this court say that the trial court erred in holding the defendant blameless? The witnesses, aside from the plaintiff, were disinterested bystanders. Every eye-witness to the transaction said that the boy ran into the machine. Aside from this evidence there is the physical fact of the dent in the fender on the side of the machine. No witness contradicts the testimony that the boy came in contact with the side of the machine, except as it is inferentially disputed by the

evidence of the boy to the effect that he was standing at the time he was struck. The trial court had the benefit of seeing and observing the witnesses, which this court has not, and, while we are by no means concluded by the decision of the trial judge on such a question, it is entitled to great weight. As is said in the following cases, such a decision must be affirmed "unless it clearly appears that it was erroneous." *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 38, 73 N. W. 573; *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 188, 120 N. W. 839; *Bohn v. Racine,* 119 Wis. 341, 343, 96 N. W. 813; *Nicoud v. Wagner,* 106 Wis. 67, 72, 81 N. W. 999; *Collins v. Janesville,* 117 Wis. 415, 423, 94 N. W. 309; *Pumorlo v. Merrill,* 125 Wis. 102, 103 N. W. 464; *McCune v. Badger,* 126 Wis. 186, 189, 105 N. W. 667.

It will be seen that the evidence in behalf of defendant as to how plaintiff received his injury was strong and convincing. That given on the part of the plaintiff was very slight, meeting by inference only the claim that plaintiff collided with the side of the machine. An examination of the evidence of the plaintiff leaves the impression that he had no clear conception of how the accident did happen. In view of the state of the evidence and of the physical fact established in the case and of the rule of law referred to, we conclude that this court should not disturb the decision of the trial judge on the question of defendant's negligence.

By the Court.—Judgment affirmed.

ASTIN, Administrator, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

October 6—October 25, 1910.

Negligence: Degrees and definitions: Liability: Single act cannot be both ordinary and gross negligence: Pleading: Joinder of causes of action: Inconsistency: Election: Practice.

1. The basic feature of the law of actionable negligence is as declared during the first year of this court's history and since steadily and firmly adhered to.
2. The basic feature above referred to is this: There are three degrees of negligence, viz.: *slight*—an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use; *ordinary*—failure to exercise on any given situation such care as the great mass of mankind ordinarily exercise under the same or similar circumstances; and *gross*—failure to exercise any care to avoid inflicting injury to the person or property of others; recklessly or wantonly acting or failing to act to avoid such injury, evincing such utter disregard of consequences as to suggest a willingness, substantially equivalent to intent, to injure, and denominated such, constructively, and classible with actual intent as regards duty to compensate for the injury.
3. The first degree is characterized by such slight inadvertence that in case of its being the fault of the injured, it does not militate against his recovering for his loss, and in case of its being the fault of the injurer the result is *damnum absque injuria.*
4. The second degree is characterized by inadvertence of the nature indicated in No. 2, and injuries proximately resulting to the person or property of another, and not proximately contributed to by that other's want of ordinary care, are actionable.
5. The third degree is not characterized by inadvertence, in the lexical sense, at all, but rather by absence of it; while in the first and second degrees it must be present and dominant.
6. There are no sub-degrees within the first and second mentioned. Want of ordinary care within the field of inadvertence is of no greater dignity if considerable than if little, so long as it is proximate, in a legal sense, to the injury.
7. The rule logically follows that an injury to a person, proximately caused by failure of another to exercise ordinary care for that person's safety, and proximately contributed to by such person's

want of ordinary care, however slight—is not actionable, comparative effects of such want of care not being recognized in our system.

8. In case of the personal or property rights of a person being physically injured by gross negligence of another, that other is liable to such person for the pecuniary loss resulting naturally and ordinarily therefrom, regardless of any want of ordinary care on the part of such person contributing thereto.

9. A cause of action sounding in ordinary negligence, is one thing, and a cause of action sounding in gross negligence is another. Both cannot characterize a single circumstance of a person being injured by another.

10. Such two causes of action, in form as characterizing a single circumstance of a person being injured by another, satisfy subd. 1, sec. 2647, Stats. (1898), in that they arise out of the same transaction, and satisfy subd. 3 of such section, in that they are both injuries to person or property.

11. The two causes of action are not inconsistent in the sense that the choice of one absolutely waives the other.

12. In circumstances rendering it difficult to determine which of such two causes of action is available, the doctrine of election does not apply, in this, the good-faith unsuccessful assertion of one does not necessarily prejudice asserting the other.

13. By necessary implication, causes satisfying the letter of subd. 1 or subd. 3, sec. 2647, Stats. (1898), must also have the element of consistency to the extent that the choice of one does not create a waiver of opportunity to turn to the other.

14. If a person grounds an action to recover for a personal injury on ordinary negligence alone, he cannot, without amending his pleading, recover on the ground of gross negligence.

15. If a person grounds an action to recover for a personal injury on gross negligence alone, he cannot, without amending his pleading, recover on the ground of ordinary negligence.

16. Gross negligence does not, to any extent, include ordinary negligence. So a charge in a complaint confusing the two, renders the pleading indefinite and uncertain and it should be construed, if practicable, as alleging either the one or the other and the trial restricted accordingly.

17. A verdict finding the defendant guilty of having failed to exercise ordinary care and of gross negligence, respecting a single circumstance of a personal injury to the plaintiff, is contradictory and will not support a judgment for the latter.

18. In general, the Code requires a plaintiff to take a stand on the cause of action upon which he expects to recover, but permits departure therefrom so far as impracticable to comply therewith.

19. By the spirit of the Code, the plaintiff, supposing he has one or the other of two causes of action to remedy a single wrong, they not being inconsistent in the sense that the choice of one till shown to be efficient necessarily waives the other, may, acting in good faith, plead both in separate counts complying with sec. 2647, Stats. (1898), and recover on the one which the case made by the evidence entitles him to.

20. In case of a person who has been injured in his person or property by wrongful conduct of another, believing such other liable for the wrong, but is uncertain whether it was characterized by ordinary or by gross negligence,—he may seek to recover compensation on both aspects, stating each in a separate cause of action and insisting upon both up to such time as there cease to be reasonably conflicting inferences on the evidence as to which is the right one.

21. In case of a situation such as mentioned in the last foregoing, upon it appearing clearly what cause of action the plaintiff has, in fact, if any, the court should take the other from the jury or dismiss the action in respect thereto.

22. In case of there being the reasonably conflicting inferences mentioned in the last foregoing, on the whole evidence, the cause should be submitted to the jury with such definite instructions as to guard against a contradictory verdict being rendered.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Action to recover compensation for damages alleged to have been caused to the surviving widow of plaintiff's intestate by the wrongful conduct of defendant's employees, causing his death.

The complaint states a cause of action based on the theory that ordinary negligence of defendant's servants was the proximate cause of the death of plaintiff's intestate, and a second cause of action grounded on the theory that gross negligence of such servants was such cause, in that they, in utter disregard of the personal safety of such intestate and conscious of his peril, caused a locomotive under their charge and control to collide with him at a public crossing of defendant's track, causing his death.

On motion in defendant's behalf plaintiff was ordered to elect between the two causes of action on which he would

rely. Upon failure to comply therewith and on motion in defendant's behalf, the action was dismissed and judgment rendered accordingly. Plaintiff appealed therefrom.

Edward H. Ryan, for the appellant.

For the respondent there was a brief by *Thos. S. Nolan,* attorney, and *C. H. Van Alstine,* of counsel, and oral argument by *Mr. Van Alstine.*

Marshall, J. If a person, owing a duty to another respecting that other's personal safety, violates it, inflicting upon such other corporal injury, under such circumstances that it is difficult for him, by the aid of professional advice, to satisfactorily determine whether the violation was characterized by what is known as gross negligence, or by the milder type of wrong denominated ordinary negligence,—may such person have the wrong, whatever be its nature, redressed in a single action to recover for his injury, pleading in one cause of action liability on the ground of gross negligence and in a second on the ground of ordinary negligence? That is the broad question raised by the appeal.

Solution of the stated question involves the letter of the written law and its spirit as well, and also our judicial code on the subject of actionable negligence. That a person, who has suffered a personal injury by actionable fault, may be so circumstanced as not to be able to truthfully assert with certainty whether the act be of the higher or the lesser degree of actionable negligence, as the full scope of the term is understood here and in many other jurisdictions,—is most natural. That he should not be obliged, regardless of circumstances,—to seek redress on one theory alone, his recoverable compensatory damages, whether claimed upon one theory or the other, being the same and dependable upon the same act, and if he fails, even upon the ground that proof of a degree of actionable wrong not alleged negatives the one alleged, the evidence of every physical fact being practically the

same in one case as in the other, leaving the particular degree only a matter of inference of fact, he must go out of court, commence over again, and submit the same evidence to another jury,—would seem to be the case; testing the matter from the standpoint of reason and common sense.

Our Code of written law respecting the joinder in one suit of two or more causes of action, possessed by one person against another, connected with a single subject of action, is very broad. Yet it has its limitations, pretty well defined in the letter of the statute and further defined by more than half a century of administration of it.

The limitations of the written law are not so free from ambiguity but that the court, progressively, has broadened the literal meaning rather than adhered strictly thereto, much less restricted it, "looking to the evils intended to be remedied, the object intended to be attained, the effects and consequences, the reason and spirit."

Many interferences with the speedy attainment of justice under the old system, growing out of arbitrary and technical rules, were intended to be substantially, if not entirely, superseded by the Code. Thereby the course, from initiation to finality, in the redress of wrongs, was intended to be as plain, as simple, as certain, as speedy, as complete, and as economical as practicable in the judgment of the wise men who framed it. Whether their broad concept of the result has been fully realized may admit of some doubt. If so, that the fault may well be attributed somewhat to that judicial inertia, as regards turning from a long established system, the creation of courts, which made such turning slow in some cases and only under coercion in others; could hardly be gainsaid. However, that this court is exceptionally free from any just criticism in that regard, and that opportunity therefor has been growing progressively remote, the history of our jurisprudence must bear unmistakable evidence.

Viewing the broad subject under discussion in the light of

the foregoing it would seem that a logical way must exist, permitted, if not commanded, by the Code,—when read in the attitude of liberality which conceived it,—for vindicating in a single action the right in such a situation as the one suggested, whether inferences from evidence shall finally locate the wrong, in case of one being established, within the field of ordinary or that of gross negligence. If there be such way and be no interfering adjudications, and yet be no exact precedent to illustrate it, it should be adopted and a new precedent made, vindicating again judicial competency and willingness to efficiently face new situations in harmony with the manifest spirit of the written law. If there be no such logical way, the responsibility is with the lawmaking power. The court cannot remedy it. If one can be so found, looking at the Code from an original standpoint, and yet, for want of previous discovery, the Code has been for a long period otherwise construed, then the adverse adjudications must give us pause and probably lead us to adhere to established things, for it were better "to bear the ills we have" and let the legislature afford a remedy, than to judicially unsettle things, so long established that such a change would have the cast of exercise of legislative rather than of judicial authority.

Prefaced by the foregoing observations we will briefly refer to the essentials of our judicial code on the subject of actionable negligence so as to bring clearly into view the relations which the two aspects of actionable wrong bear to each other.

The basic feature of our system was established in the earlier days of the court, as indicated by the opinion of Whiton, C. J., in *Richards v. Sperry,* 2 Wis. 216. The minor features were soon fully developed and there has been little or no change for over half a century other than by legislative interference in exceptional situations. In the whole, it forms a plain, consistent, definite, just system, one easily to be understood by professional minds of ordinary training, and one readily applicable, when fairly explained by the trained judi-

cial mind, by the ordinary juries of the country to the various situations liable to arise calling therefor. By such definite system, resting on a broad, sensible foundation and rising harmoniously to the finality of minor details, enabling courts to be guided, in the main, by principles instead of mere precedents; justice is capable of being administered on the basis of law as a science instead of its drifting into confusion and taking on the cast of results of arbitration by courts. The system has been so long established that, paying due regard for the doctrine of *stare decisis,* as a binding limitation upon judicial changes of settled law, the court could not now materially disturb it without, in effect, encroaching upon a field reserved by the constitution for legislative activity.

The basic principle above referred to is that there are three degrees of negligence, viz.: slight, ordinary, and gross. The first is "an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use." It has the element of inadvertence, but damaging results for failure to abstain therefrom are *damnum absque injuria,* while the party injured, and so failing and thereby contributing in a remote degree to his injury, is not precluded by that alone from obtaining judicial redress.

In the second degree of negligence, as its name signifies, there is inadvertence, in that the guilty party in the particular situation, fails to exercise such care as the great mass of mankind ordinarily exercise under the same or similar circumstances. Injuries to personal or property rights of one, proximately caused by failure of another to exercise such degree of care as regards the safety of that one's rights, are actionable, he not being efficiently at fault, in being guilty of some want of ordinary care contributing to the injury.

The third degree of negligence is gross negligence, so called. It has for its name somewhat of a misnomer, in that the fault is not characterized by inadvertence, in the lexical sense, at all. As in the first and second degrees such element must be

present and dominant, in the third it must be absent. The wrong is characterized by an absence of any care on the part of a person having a duty to perform to avoid inflicting an injury to the personal or property rights of another, by recklessly or wantonly acting or failing to act to avoid doing such injury, evincing such an utter disregard of consequences as to suggest some degree of intent, to cause such injury. Various terms have been used to characterize the mental state of the wrongdoer in such a case, as rashly, recklessly, wilfully, wantonly, and even intentionally. Early it was said that such state involves such disregard of consequences as to evince little short of actual intent, that the latter and the other conditions so run together, that no attempt in administration should be made to separate them as regards legal consequences of a compensatory nature.

So the court long since came to treat the third degree of wrong in all its phases as raising such a strong inference of malice as to be regardable as either actually or constructively intentional and to make no difference which, so far as relates to defenses and to recovery of compensatory damages.

The logical result of the foregoing major principle is, that there are no sub-degrees within the major degrees of negligence, known in our law. Want of ordinary care within the field of inadvertence, is of no greater dignity, if considerable than if little, so long as it is proximate, in a legal sense, to the injury.

Hence follows, logically, the idea that in case of an injury proximately caused by want of ordinary care on both sides, however slight such want of care may be on the part of the injured party, in the law, it is *damnum absque injuria*. In other words, the doctrine of comparative negligence has no place whatever in our system. *Randall v. Northwestern Tel. Co.* 54 Wis. 140, 11 N. W. 419; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446; *Tesch v. Milwaukee E. R. & L. Co.* 108 Wis. 593, 84 N. W. 823.

From the last foregoing stated principle this other, established with it, logically resulted: In case of the personal or property rights of a person being injuriously violated, in the physical sense, by another, that other being guilty of gross negligence in causing such injury, he is responsible to at least make good to such person his pecuniary loss resulting from the wrong, notwithstanding such person may have proximately contributed to produce the damage by his own want of ordinary care. Here, as we see, there is no proximately concurring negligence, in the sense of inadvertence, that element being present in the wronged party's conduct, but absent in that of the wrongdoer.

It follows from the situation stated, that a cause of action sounding in ordinary negligence is one thing, and one sounding in gross negligence is another. Proof of the latter disproves the former. Pleading of the one by itself, in effect, pleads that the other does not exist. They are essentially different, yet the actual wrong and the actual injury, and the compensation equivalent in money, is the same, whether the cause of action be in the one or the other. That suggests that there can be but one recovery therefor, but one efficient cause of action in the ultimate. The difficulty, as before indicated, lies, in the main, in fair doubt on the part of the pleader as regards the proper inference to be drawn from evidentiary facts. Such facts may be entirely common to the two situations.

So we return to the opening inquiry, why in the name of the broad beneficent spirit of the Code cannot justice be rendered in a single action and upon a single trial according as the jury may reasonably draw the inference of fact? If it cannot, then perhaps the written law is infirm where the unwritten was not.

If we could view the situation under discussion as involving two causes of action in the ordinary sense, the Code provisions governing the matter are subd. 1 and subd. 3,

sec. 2647, Stats. (1898). The one permits joining two or more causes of action arising out of the same transaction, or transactions connected with the same subject of action. The other permits joining two or more causes of action for "injuries, with or without force, to person or property." Both are subject to the limitation that the causes must belong to one class, affect all the parties, not require different places of trial, and be stated separately. It is manifest without discussion that the two causes of action, so called, in the situation before us amply satisfy the letter of all those requirements. Do they satisfy the real meaning of the term "several causes of action" as used in the statute?

There is room, as an original matter, to hold that the statute contemplates the existence of causes of action, each to redress a wrong of some sort so far independent of the redress of any wrong involved in any other cause of action, that a recovery in one will not, necessarily, militate against a recovery at the same time in the other. Would not such a holding, leaving no room for exceptions, be construing the written law restrictively, contrary to the ordinary rule requiring remedial statutes to be liberally construed? If a restrictive, rather narrow construction were necessary to carry out a manifest intent, then it would be legitimate.

Is there the manifest intent above referred to further than to the extent of excluding from the scope of the statute the idea of joinability of two causes of action, satisfying the letter of either subdivision referred to, in a case where the assertion of the right to a remedy by one cause of action irrevocably waives the right to redress by any other; as a situation affording the wronged party opportunity to sue for damages on contract, on the theory of its continued existence, or rescind and sue to recover the consideration parted with on the contract, on the theory that it no longer exists? Does the spirit of the statute clearly extend to a situation where, instead of there being opportunity for a choice of remedies by irrevocably

surrendering others which are inconsistent therewith, there are two merely apparent remedies, though only one in fact, such two not being inconsistent in the very groundwork, but only in the mere assertion of the existence of a particular essential element in one, negativing existence of a particular essential element in the other, the two being claimed because of uncertainty as to which is proper? In that situation does the unsuccessful assertion of one preclude claiming the benefit of the other?

That the doctrine of election does not apply to a mere choice of a wrong remedy, is familiar. *Fuller-Warren Co. v. Harter,* 110 Wis. 80, 85 N. W. 698; *Clausen v. Head,* 110 Wis. 405, 410, 85 N. W. 1028. If the idea that the intent of the statute was to exclude joining causes of action upon that species of inconsistency, it is easy to see that it is inefficient to justly respond to the needs of such situations as the one under discussion and many others.

The inconsistency precluding the joining of causes of action, which we find, in general, treated in the books, is of such character that the doctrine of fatal election above indicated applies. For instance it is said in Maxwell on Code Pleading at page 345:

"If a vendor in his petition seeks to recover a judgment for the unpaid purchase money, and also to have the contract canceled because of the failure of the vendee to pay the amount due, the causes of action cannot be joined, because the action to recover the amount due is an affirmance of the contract."

Treating the same subject, it is said in Bliss on Code Pleading at sec. 122 (3d ed.): Causes of action to be joined must not be inconsistent in that "one cause of action, if valid, should not show the others to be bad." The illustrations, however, in the main, are in harmony with the quotation from Maxwell. The same is true of the treatment of the subject by all text-writers, supported by substantially all the illus-

trative authorities. Remarks by the way are found, here and there, in our decisions to the same effect when applied to like situations. *Pierce v. Carey*, 37 Wis. 232.

Our Code on the subject was adopted without material variance from New York. Before any change was made in New York causes were there not joinable, if inconsistency existed of such nature that an unqualified assertion of one operated as an estoppel to claim the other. It is evidently not to that class ANDREWS, J., referred in *Krower v. Reynolds*, 99 N. Y. 245, 1 N. E. 775, in saying:

"A plaintiff may join in his complaint different and even inconsistent causes of action, provided only that they all belong to one of the classes mentioned in sec. 484 of the Code."

The learned judge overlooked the material amendment to the section made in 1877. Nothing of the like is found in our Code. The amendment added to the language as to the necessity for causes to belong to a single class the words "that they are consistent with each other." The unqualified remark in the *Krower Case* is accounted for in 1 Nichols, New York Practice, 71, note 378, on the ground that the amendment of 1877 was overlooked. Since such amendment we find cases condemning the joining of two causes of action, regardless of whether the mere choice of one permanently precludes resorting to the other. *McClure v. Wilson*, 13 App. Div. 274, 43 N. Y. Supp. 209; *Perkins v. Slocum*, 82 Hun, 366, 31 N. Y. Supp. 474; *Barkley v. Williams*, 64 N. Y. Supp. 318, 30 Misc. 687.

In the last case cited the pleader joined a cause of action for inadvertent misconduct with one for wilful misconduct growing out of the same transaction. Under the former plaintiff was entitled to actual damages, only, while under the latter he was entitled, by force of a statute, to treble damages. This case fits pretty squarely the subject under discussion, independently of the change in the New York Code and the fact that one of the causes of action was treated as on contract

and the other as sounding in tort, while in the situation to be solved here both causes of action are of a tortious character. It is plain that the New York court, independently of other reasons, held the two causes not joinable because of the express statutory requirement for consistency. Absence of any such express requirement from our Code gives rise to a strong inference that mere inconsistency in stating causes of the same class to redress a simple injury, the assertion of neither, in case of its not being the right one, necessarily precluding resort to the other, the two in conjunction only contemplating a single satisfaction and to the same degree, as regards compensable loss, does not militate against the statute being given effect in its letter.

The inference above suggested is quite efficiently emphasized by the early case of *Whitney v. C. & N. W. R. Co.* 27 Wis. 327, and the recent case of *Schultz v. Kosbab,* 125 Wis. 157, 103 N. W. 237. In each there were two or more causes of action contemplating only a single satisfaction for a single wrong, it being evident that the pleader stated his case in the double aspect because of not knowing, satisfactorily, upon what precise theory the evidence might entitle him to redress.

In both cases it was claimed that the causes of action were not joinable, because inconsistent with each other. In the first error was assigned because plaintiff was not required to choose one of the theories presented and abandon the rest. This court said, in effect: It might be difficult to tell in advance precisely upon what theory of the situation the loss claimed was recoverable. Of course, plaintiff was entitled to recover on whichever of the two theories of right thereto, the evidence might warrant. In general, the Code requires a plaintiff to take a stand upon the cause of action he expects to recover on. But it is not always possible for a party to determine the exact ground of liability. In such circumstances, the defendant not being prejudiced for want of information regarding the injury to be redressed, there is no substan-

tial reason why two apparent theories cannot, plaintiff acting in good faith, be joined up to such time as all reasonable uncertainty disappears as to which theory or cause of action is the correct one. A complainant should not be precluded from presenting both of the somewhat inconsistent causes for adjudication so long as he has reasonable ground for not waiving either.

Obviously those remarks can only apply to two causes of action belonging to the same class, where the claim under one does not necessarily waive, permanently, all right under the other; the situation where there are two remedies in fact, not merely two claimed remedies, the unsuccessful pursuit of one not being prejudicial to resorting to the other. *Fuller-Warren Co. v. Harter,* 110 Wis. 80, 85 N. W. 698, supports this.

Doubtless the learned trial court concluded that the logic of our judicial code, making a cause of action for recovery on the ground of gross negligence substantially different from one to recover on the ground of ordinary negligence (want of ordinary care), requires the complainant to take a stand upon one theory or the other. Whether it was thought a plaintiff shall be compelled to abandon one of his causes of action permanently, or for the purposes of the case, and only finally, in case of a recovery on the other, is not clear.

There is no precedent in our decisions to precisely fit the situation here, while there are several decisions, as we shall see, that might fairly have led the learned judge to conclude as he did. The difficulties of the situation were such, that the reasoning in this opinion and the conclusion reached are not pregnant with any reflection upon the administration in the court below.

In *McClellan v. Chippewa Valley E. R. Co.* 110 Wis. 326, 85 N. W. 1018, in harmony with the established principles of negligence law before mentioned, it was decided that there is such a definite distinction between a cause of action grounded on want of ordinary care and one grounded on the

degree of wrong called gross negligence, that evidence tending to prove the latter is not admissible under a complaint charging only the former, because, said the court, "the defendant is entitled to know what the cause of action is upon which the plaintiff relies." It was not intended thereby to declare that it is incumbent on the plaintiff to make a binding choice of remedies for his injury where he cannot safely do so, and the defendant would not be prejudiced by a failure in that regard. Of course, a defendant might be prejudiced by plaintiff presenting one cause of action, as if he relied on that alone, and then being allowed to recover on another.

In *Wilson v. Chippewa Valley E. R. Co.* 120 Wis. 636, 98 N. W. 536, the court, consistently with the foregoing, held that if a plaintiff seeks to recover on a complaint charging gross negligence alone, he cannot recover on the ground of failure of defendant to exercise ordinary care.

In *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65, 98 N. W. 948, the pleader, in the charging clause of his complaint, used language appropriate to guilt of the defendant of failure to use ordinary care and guilt of gross negligence as well. There was a nonsuit. The court treated the complaint as open to a motion for indefiniteness in that the two causes of action were so confused as not to convey any clear idea of the nature of plaintiff's claim. Viewing the pleading as if the intent of the pleader was to charge gross negligence, the nonsuit complained of was held sustainable upon two grounds, one being that there was no evidence of that degree of wrong. Viewing the pleading as if the pleader intended to charge ordinary negligence only, it was held that the nonsuit was improperly granted as there was evidence tending to establish actionable wrong of that character. It being manifest from the record that the parties and the court on the trial treated the pleading as charging want of ordinary care, and that it would reasonably bear that construction, the indefiniteness was thought to have been eliminated by practical construction,

so the judgment was reversed for error in granting the nonsuit, there being some evidence tending to establish the cause of action so read out of the complaint.

In *Rideout v. Winnebago T. Co.* 123 Wis. 297, 101 N. W. 672, the same subject came up in a little different way. The complaint charged the two degrees of wrong, confusing them together. On the trial it was claimed on behalf of plaintiff, the intention was to charge gross negligence only. Evidence was introduced which might tend to support such charge or the milder degree of wrong. The court refused to adopt plaintiff's view of his pleading and submitted the case to the jury in both aspects, resulting in a verdict in favor of plaintiff on both. On appeal it was held bad for inconsistency; that there was, in effect, a finding that defendant was and that it was not guilty of each of the charges of misconduct. The cause was reversed and remanded for a new trial on the charge of gross negligence as the only one contained in the complaint. *Haverlund v. C., St. P., M. & O. R. Co., ante,* p. 415, took the same course.

Thus it will be seen, as follows: 1st. If a cause of action for gross negligence only be pleaded the plaintiff cannot properly recover on the ground of failure of defendant to exercise ordinary care, because the two aspects involve two causes of action so essentially different from each other that if one results in a particular actionable injury the other cannot. 2d. For the same reason if a person alleges against another only failure to exercise ordinary care proximately causing an actionable injury, he cannot properly recover on the ground of gross negligence. 3d. For the same reason if a person alleges against another both forms of misconduct, confusing them together, as if one includes the other and characterizes the same act, and the case is dismissed on the merits for want of evidence to warrant a recovery when there is, in fact, evidence to warrant a recovery on one of the grounds of actionable wrong, and the complaint will admit, reasonably, of a

construction charging such wrong, there should be a new trial upon such charge alone. 4th. In case of a charge in the manner aforesaid, the complaint indicating that the pleader did not intend to present but one cause of action, the pleading is open to a motion to make more definite and certain, or to a motion that plaintiff be required to elect upon which phase of actionable wrong he proposes to stand, and, if the court treats the case as if both phases of actionable wrong can characterize the same act, submitting the cause on such theory, resulting in a verdict condemning defendant accordingly, the verdict will not support a judgment because the finding in plaintiff's favor on one charge, by necessary implication, finds in defendant's favor on the other.

We perceive no reason for departing from anything decided in the cases referred to. They do not militate against both causes of actionable wrong being stated in the same complaint, if stated separately, substantially eliminating indefiniteness as to plaintiff's position by indicating, clearly, that he does not know precisely the phase of actionable wrong the evidence and inferences therefrom will disclose and that, therefore, he proposes to challenge defendant on both and recover on the one actually possessed, but not on the other. It follows from the fact that the two causes of action belong to the same class, satisfy in all respects the letter of the statute respecting the joinder of causes of action, and are not inconsistent in that claiming the benefit of one necessarily waives the other. They are only inconsistent in that though one, for precautionary purposes, claim the benefit of both, he can have, in the ultimate, the benefit of but one and not that one except upon a verdict definitely and consistently finding the facts.

The foregoing answers the propositions stated for decision in the opening lines of this opinion. It vindicates the letter and likewise the spirit, before referred to, of the Code. It regards every phase of our judicial code of negligence law, as the same, without material change, has stood the test of more

than half a century of administration, and vindicates and harmonizes all the holdings of the court relating to the subject under discussion, leading logically to a decision in this case that the trial court erred in requiring plaintiff to stand upon one of his definitely stated causes of action, abandoning the other, and erred in dismissing the case for noncompliance with such requirement.

There need be no difficulty in administering the law as here declared. There is no striking novelty in the matter. The written and the unwritten law and natural justice as regards both parties to such a controversy permit the settlement of such, as to the liability for one wrong in one action. If it were true that a plaintiff, not knowing precisely the cause of actionable personal injury he will be able to establish to the satisfaction of a jury, though convinced that he will be able to establish one, must permanently abandon one in order to pursue an action on either, or even abandon one pending a final adjudication upon the other, rendering two actions and two trials possibly necessary to a final determination of the matter, there would exist a most grievous infirmity in our system of administering justice. An infirmity which the fathers of the Code evidently intended should not exist. An infirmity which the court should not engraft upon it, nor read out of it by construction, if that can be reasonably avoided.

Doubtless in submitting a case to the jury on such a pleading as we have here, there being evidence giving rise to conflicting reasonable inferences as to only one of the causes of action, the other should be taken from the jury, and there being evidence giving rise to such inferences as to whether the wrong, if perpetrated, happened through unavoidable inadvertence, or through intent, constructive or actual, the court should submit the cause with such clear statement of the law as to guard against the jury rendering a contradictory verdict.

If the practice in foreign jurisdictions under a Code and

judicial system like ours were found not to be in strict harmony with the conclusion we have reached, it would not lead to a different result. The practice is largely of judicial creation, even where based on written law. So, differences, more or less significant, are liable to grow up from the varying attitudes of courts in the construction of statutes, and in respect to what is expedient where that field of activity is open to them, as it is in great measure on matters of mere procedure. The authorities elsewhere under a system similar to ours, so far as they touch the subject definitely, are in harmony with our conclusion. We will only refer to the following few of them: *Indiana, B. & W. R. Co. v. Burdge,* 94 Ind. 46; *Pennsylvania Co. v. Smith,* 98 Ind. 42; *Indiana, B. & W. R. Co. v. Overton,* 117 Ind. 253, 20 N. E. 147; *Cleveland, C., C. & St. L. R. Co. v. Miller,* 149 Ind. 490, 509, 49 N. E. 445; *Highland Ave. & B. R. Co. v. Winn,* 93 Ala. 306, 9 South. 509; *Kansas City, M. & B. R. Co. v. Crocker,* 95 Ala. 412, 433, 11 South. 262; *Louisville & N. R. Co. v. Hurt,* 101 Ala. 34, 13 South. 130; *Louisville & N. R. Co. v. Markee,* 103 Ala. 160, 171, 15 South. 511; Shearman & Redf. Neg. (5th ed.) § 7.

In *Indiana, B. & W. R. Co. v. Overton, supra,* the court stated the matter thus:

"A party cannot frame *a single paragraph* of complaint in such manner as to be entitled to recover either for an intentional or negligent injury, as the facts may appear. The plaintiff having elected to sue for an injury intentionally and wilfully committed, he must stand by that theory, and cannot, without other pleadings, shift his ground and recover upon the theory that the defendant was negligent."

In *Louisville & N. R. Co. v. Markee, supra,* the court met the question more definitely, thus:

"A declaration or complaint may in one count aver simple negligence, in another wilful and intentional wrong, and proper issues may be made up under the pleas to each count;

or, if the complaint charged either the one or the other, and the proof was such as to require an amendment of the pleadings by adding a new count, this should be allowed, and a plea to the complaint as amended filed. Justice might require a continuance under some circumstances, but the question of a continuance, to prevent injustice or undue advantage, would depend greatly upon the circumstances of each case."

The subject is treated at some length in Pom. Code Rem. (4th ed.) § 467, *Whitney v. C. & N. W. R. Co.* 27 Wis. 327, being cited as the leading authority, followed by many others. The general idea is that where there is but a single demand the plaintiff may, acting reasonably, join in his complaint two counts for the purpose of redressing the matter, stating each count in the form of a distinct cause of action and so that they differ from each other so far as necessary to meet the two aspects of the situation from the plaintiff's viewpoint.

We do not overlook the fact that it is given in Shearman & Redfield on Negligence that where the facts of a case like this are of doubtful construction and plaintiff by not understanding his case has predicated it on the wrong theory of actionable misconduct he may amend and stand on the right one, keeping in mind that the final choice will necessarily be binding so as to waive any other cause of action. If the writer intended by that to say that the party, when the facts of his case are susceptible of a double construction, cannot, under any circumstances, have it submitted to the jury to draw the proper inference, he confuses the matter with those situations where the doctrine of election, strictly so called, applies, and the courts cited do not bear out the text, as has been seen.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings according to law.

TIMLIN, J. I concur in the result reached in this case.

ESTATE OF BARLASS: BARLASS, Appellant, vs. BARLASS, Respondent.

October 6—October 25, 1910.

Estates of decedents: When administration may be granted: Jurisdiction of county court.

1. **Upon the death of an inhabitant or resident of this state a *prima facie* showing, or even a *bona fide* claim, that he left an estate will support the granting of letters of administration by the proper county court; and the question of the validity of such claim should be left for future litigation in the proper forum and between the proper parties.**
2. **The mere existence of assets, irrespective of amount or value, will support a grant of administration.**

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

The appeal is from a judgment of the circuit court reversing an order of the county court of Rock county appointing *David M. Barlass* an administrator of the estate of Thomas Barlass, deceased.

The verified petition of *David M. Barlass* for administration alleges that Thomas Barlass, deceased, left personal estate of the value of $5,000 and real estate of the value of $21,000. The contestant, *John T. Barlass,* claims that the deceased in his lifetime executed a bill of sale of all his personal property to him and that the real estate was likewise deeded to him and his sister, Janette Irish. The petitioner contends that such instruments were executed through fraud and undue influence and that the deeds were never delivered. The validity of these conveyances was litigated in the circuit court upon the appeal from the order of the county court appointing an administrator, and the circuit court found as facts (1) that Thomas Barlass, deceased, was an inhabitant of Rock county, Wisconsin, and died intestate November 12, 1908; (2) that he left him surviving *John T. Barlass, David M. Barlass,* his sons,

and Janette Irish, his daughter, all adults, as his only heirs at law; (3) that he left no personal estate; (4) that he left no real estate; (5) that he left $36 which was used to pay funeral expenses; and (6) that there were no debts or claims chargeable against or due the deceased or the estate; and entered judgment as above stated. The petitioner appealed.

J. J. Cunningham, for the appellant.

E. D. McGowan, for the respondent.

Vinje, J. Sec. 2443, Stats. (1898), provides that:

"The jurisdiction of the county court shall extend to the probate of wills and granting letters testamentary and of administration on the estates of all persons deceased who were at the time of their decease inhabitants of or residents in the same county and of all who shall die without the state having any estate within such county to be administered. . . ."

And sec. 3806, Stats. (1898), says:

"When any person shall die intestate, being an inhabitant of this state, letters of administration of his estate shall be granted by the county court of the county of which he was an inhabitant at the time of his death. . . ."

These provisions confer jurisdiction upon the county court to act (1) when it is shown that an inhabitant of or resident in the same county has died; (2) when it is shown that a person has died without the state having any estate within such county to be administered. In the first case the jurisdictional facts are domicile and death; in the second, the existence of an estate within the county to be administered, and death without the state. In each case such jurisdictional facts may be controverted upon the hearing of a petition for letters testamentary or of administration, and they must be established before the court acquires jurisdiction to act. Not so, however, as to the existence of an estate in the case of the death of a resident of the county. A *prima facie* showing that there is an estate, or a *bona fide* claim that deceased left property

to be administered, or the *prima facie* showing of any other statutory ground for the granting of letters of administration, is all that is necessary. Thus it was held in *Perkins v. Owen,* 123 Wis. 238, 101 N. W. 415, that intestacy was not a fact that must exist in order to confer jurisdiction upon the county court to administer an estate as intestate estate. In a case like the one at bar a *bona fide* claim that there is an estate to administer will support the granting of letters, and the court should not proceed to adjudge the validity of the claim. That must be left for future litigation in the proper forum and between the proper parties. *Parsons v. Spaulding,* 130 Mass. 83, 86; *Grimes v. Talbert,* 14 Md. 169, 172; *In re Brooks's Estate,* 110 Mich. 8, 67 N. W. 975; Schouler, Ex'rs, § 93; 1 Woerner, Adm'n, § 204. Moreover, in this case the court found that deceased left $36. The fact that it was afterward used, and properly so, for funeral expenses, is immaterial. The status at the time of death governs. It has been held that the mere existence of local assets, irrespective of amount or value, will support a local grant of administration. *Pinney v. McGregory,* 102 Mass. 186; *Mo. Pac. R. Co. v. Bradley,* 51 Neb. 596, 71 N. W. 283; *Horton v. Trompeter,* 53 Kan. 150, 35 Pac. 1106.

In *Flood v. Pilgrim,* 32 Wis. 376, LYON, J., was strongly inclined to think that a local grant of letters, where there is no estate, is absolutely null and void; and in *Filbey v. Carrier,* 45 Wis. 469, he reiterated this opinion. In neither case, however, was the question involved. Both cases turned upon the right of the administrator to the possession or use of real estate. While it would undoubtedly be an abuse of discretion on the part of the county court to appoint an administrator in a case where it is conceded there is no estate or other statutory ground for the appointment, the deceased being a resident, yet it cannot be said that the act of appointment is beyond the jurisdiction of the court.

Counsel for contestant cites *Jordan v. C. & N. W. R. Co.*

125 Wis. 581, 104 N. W. 803; *Grimes v. Talbert,* 14 Md. 169; *Pinney v. McGregory,* 102 Mass. 186; *Beach's Appeal,* 76 Conn. 118, 55 Atl. 596; *Van Giessen v. Bridgford,* 83 N. Y. 348, and *Wright v. Smith,* 19 Nev. 143, 7 Pac. 365, to show that in each of those cases the question of the existence of an estate was litigated upon the hearing of the petition for the appointment of an administrator. In all but the last two cases the deceased was a nonresident, and of course the question of the existence of an estate within the territorial limits of the court had to be settled to determine its jurisdiction. In *Van Giessen v. Bridgford, supra,* the deceased died in 1663, and when the application for administration was made in 1877 the court presumed ancient administration, especially in view of the fact that the family bible and pair of earrings sought to be administered upon were not satisfactorily shown ever to have belonged to the deceased. The case of *Wright v. Smith, supra,* was decided under a special statute in force in Nevada as to community property, and has no application to the question under consideration.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment affirming the order of the county court.

ROCK COUNTY, Appellant, vs. WEIRICK, Respondent.

October 6—October 25, 1910.

Counties: Title abstracts: Public records: Right to copy: Unauthorized sale of county property: Compelling restoration: Equity: When plaintiff failing in equity may have legal relief.

1. By ch. 352, Laws of 1864, counties were authorized to purchase complete abstracts of title to the real estate therein, but the time limited for the exercise of this power, as extended by ch. 39, Laws of 1867, expired in June, 1867, and thereafter there was no express authority for establishing anything of that character

beyond a tract index, until the enactment of ch. 149, Laws of 1881.

2. A county cannot without legislative authority go into the abstract business for profit.

3. Where a county, assuming that it had power to procure title abstract books and keep them in the register's office for the benefit of the public, contracted for the compilation of such books, and a few days later the legislature supplied the necessary authority and the work thereafter proceeded to completion, the books were not mere literary property of the county, but became a part of the public records of the register's office which any person had a right to copy under the reasonable supervision of the register, even for the purpose of making a rival set of abstract books.

4. Even though the "purchasing committee" of a county board had no authority to sell to the register of deeds certain blank books belonging to the county (for which he paid $48), yet after he had in good faith expended $900 in copying into said books the public abstracts of title, with a view to going into the abstract business at the close of his official term, a court of equity would not compel him to restore the books to the county upon tender of the price paid by him.

5. There are two cases in which a plaintiff who has planted his suit in equity and failed to sustain it may be given legal relief if the proof shows that he has a good cause of action at law therefor: (1) where a cause of action in equity once existed and is stated in the complaint, but because of the happening of some event for which the plaintiff is not responsible it no longer exists; (2) where plaintiff alleges a good cause of action in equity in good faith believing it capable of proof, but fails to prove some fact essential to a recovery in equity because such fact never existed. In both cases the complaint must state a good cause of action in equity and the plaintiff must in good faith believe it to exist at the time.

6. Where, in an equitable action by a county to prevent the register of deeds from copying the county abstract books, it is sought incidentally to recover the county's share of fees collected by him for abstracts, but upon the face of the complaint plaintiff was never entitled to equitable relief of any kind, the entire complaint should be dismissed without prejudice to an action at law to recover the alleged fees.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This is an action in equity brought by the county to perpetually enjoin the defendant, who is the register of deeds of said county, from making copies of the abstract books owned by the county and kept in the register's office. In the year 1880 the county board of supervisors of *Rock* county, after considering for several months the question of installing a tract index in the register's office, decided to have made and placed in the register's office a complete title abstract of the real estate of the county, using Walton's patented system, and in pursuance of this conclusion, on January 7, 1881, the county board authorized the county clerk to purchase the exclusive right and privilege to use Walton's system of title abstract to lands in *Rock* county and to make a contract with one Valentine, who was then the register of deeds of the county, to make and complete said title abstract within two years from date, for which Valentine was to be paid the sum of $3,200 on acceptance of the books. It appears that the formal written contract was executed March 17, 1881. The abstract books were not completed until some time in the fall of 1885, and in November of that year they were accepted by the county, and in the following January the county board provided that the abstract books should be kept by the register of deeds and that he should charge the sum of twenty-five cents per entry for making abstracts therefrom; that he should keep the abstract books written up, and should receive for such labor and for making the abstracts one half of all the fees received for abstracts and pay over the other half every three months into the county treasury. The plan so adopted was carried out by successive registers of deeds until shortly before the commencement of this action. On January 9, 1897, the county board instructed the then register of deeds to allow no one to make abstracts for sale from the county books.

The defendant, *Weirick,* became register of deeds in January, 1903, and has remained in office ever since, his salary

being fixed at $2,000 per year during the first two years and at $1,800 per year during the subsequent time. From the time he went into office up to the 1st of January, 1910, the defendant has regularly turned over one half of the fees received by him for making abstracts of the county, but he did not turn over the amount received during the first quarter of the year 1910. In November, 1909, the defendant purchased sixteen blank books belonging to the county through the purchasing committee of the county board, paying therefor $48, and immediately commenced copying the county abstract records into these books for the purpose of going into the abstract business at the end of his term of office. At the time of the commencement of this action he had expended about $900 in such work. In March, 1910, the county board notified him to "immediately cease copying the abstract books owned by *Rock* county and to remove from the office of the register of deeds for *Rock* county all persons under his personal employ." During the same month the county board caused demand to be made upon the defendant for the return of the sixteen books, and at the same time tendered to the defendant the sum of $48 which he had paid for them.

The relief demanded by the complaint is not only to perpetually enjoin the defendant from copying the books, but also to compel the surrender back to the county of the books with all the entries in them, and to compel the defendant to account for and pay over to the county its share of the fees received for abstracts which has not already been accounted for. The circuit court decided that the abstract books were public records and that the defendant was entitled to copy them, and entered judgment dismissing the complaint, from which the county appeals.

For the appellant there were briefs signed by *John L. Fisher,* district attorney, and *William Ruger,* of counsel (by *William Ruger*), and oral argument by *Mr. Ruger.* As to common-law rights in respect to public records, they cited

1 Greenl. Ev. § 475; 34 Cyc. 592–594; 8 Current Law, 1698–1700; *Hanson v. Eichstaedt*, 69 Wis. 538. And to the point that the county abstract books were its literary property, they cited, among other authorities, *Dart v. Woodhouse*, 40 Mich. 399; *Leon L. & A. Co. v. Equalization Board*, 86 Iowa, 127, 53 N. W. 94, 17 L. R. A. 199; *Booth & H. A. Co. v. Phelps*, 8 Wash. 549, 36 Pac. 489, 23 L. R. A. 864.

For the respondent there was a brief by *F. C. Burpee* and *Jeffris, Mouat, Smith & Avery*, and oral argument by *Mr. Burpee* and *Mr. M. G. Jeffris*

Winslow, C. J. The important question in this case, to which all others are merely subsidiary, is whether the county abstract books of *Rock* county are a part of the public records of the register's office. If they are, any person has a right to copy them under the reasonable supervision of the register of deeds, even for the purpose of making a rival set of abstract books. Sec. 700, Stats. (1898); *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. 30.

It is argued on behalf of the county that the abstract books were merely the literary property of the county and not public records, and hence that the county could prevent the copying of the books and thus protect itself from competition in the abstract business. This argument is based principally on the fact that in January, 1881, when the county board authorized the making of the contract with Valentine to compile the abstract books, there was no provision of law authorizing or requiring the county to keep any such books, and hence it is claimed that the status of the books as merely literary property was then irrevocably fixed, and could not be changed by any subsequent legislation which recognized the right of the county to make and keep abstract books as part of the public records.

We are unable to agree with this argument. It is true that there was no express provision of law in force in Janu-

ary, 1881, which authorized a county to establish a public abstract system. By ch. 352 of the Laws of 1864 any county had been authorized to purchase a "complete and reliable abstract of title" to the real estate of the county, providing the purchase should be made before June 1, 1864, and by ch. 39 of the Laws of 1867 this time limit had been extended to June, 1867, but it is evident that the powers thus granted had expired by limitation. These last named acts, however, required the making and keeping up of tract indices in the discretion of the respective county boards, and these provisions passed into the Revised Statutes of 1878 and became sec. 762 of those Statutes.

Thus it appears that the condition of the law when the county board was considering the question of establishing a tract index system in 1880 was this: A tract index was authorized to be kept, but there was no express authority to establish abstract books, although a complete abstract system had been twice permitted to be substituted for the tract index under time limits which had expired. It seems a fair presumption that in some county or counties abstracts had been instituted as a part of the county records under the acts of 1864 and 1867. Under these circumstances the county board concluded not to install the tract index system, but to obtain and keep up a complete set of abstract books "to be made and owned by the county," as is said in the report of the committee recommending the scheme, which report was adopted by the county board. That this system was adopted because it was believed to be a public benefit there can be no doubt from the wording of the report above referred to.

It appears that the written contract for the making of the abstract was not executed until March 17, 1881. On the 22d of the same month ch. 149 of the Laws of 1881 was passed, which provides in substance that any county having a tract index may discontinue the same "whenever such county *may have adopted,* or may hereafter adopt and shall keep and

maintain, a complete abstract of title to the real estate of such county as part of the official records of the register of deeds of such county." This provision passed into sec. 762 of the Statutes of 1898 with slight changes in verbiage. It recognized the fact that some counties already had abstract books, and by necessary implication authorized any county to adopt the system. At that time the contract for the *Rock* county system had been made, but it is not supposable that any material work had been done upon it, for the written contract was not made until March 17th and the work was not completed until the summer of 1885.

Thus the county had assumed that it might lawfully procure the abstract books and keep them in the register's office for the benefit of the public, and before any substantial work was done on the system the legislature passed a law authorizing the installation of just such books in the register's office as a part of the public records, and thereafter the work was done, the books accepted and placed in the register's office while the provisions of this law were in full force and effect.

A county is a governmental agency with limited powers, all of which are prescribed by the statute. *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798. It will hardly be claimed that *Rock* county had power to go into the abstract business for profit, without legislative authority, although such authority has now been given to counties having a population of 60,000 and over. Ch. 326, Laws of 1909. When it had, however, assumed that it had power to install abstract books as a part of the public records and made a contract for the compilation of the books, and the legislature immediately supplied the necessary authority and the work thereafter proceeded to completion, would it not be hypercritical to say that the books are not public records because the formal contract for them was made a few days before the legislature authorized the making of such a contract? We think so, and so thinking we reach the conclusion, following the *Eichstaedt*

Case (69 Wis. 538, 35 N. W. 30), that the county cannot prevent the copying of these public records by the defendant. *Chicago T. & T. Co. v. Danforth,* 236 Ill. 554.

It appears that the respondent purchased the sixteen books in question of the *purchasing* committee of the county board. It is argued, and not seriously disputed, that this committee had no authority to *sell* the county property, and hence that the respondent acquired no title to the books. Before the commencement of this action the county demanded the return of the books and tendered back the money paid therefor, and now claims the right to the possession of the books on the ground that the title never passed to the respondent, even should it be held that the county abstract books themselves are public records and may be properly copied. It is a fact, however, that the defendant has laid out about $900 in transferring into these books the entries in the abstract books of the county, so that they constitute now a partially completed abstract system worth at least the amount so expended, instead of a set of blank books which could be duplicated at any book bindery. There seems no question of the good faith of the defendant in making the purchase and copying the entries into the books. It would be manifestly grossly unjust to take from him the money and labor which he has spent in good faith in transforming mere blank books into a partial abstract system. Courts of equity do not allow themselves to be made the instruments of injustice in this manner. He who appeals to equity must do equity, and it is certainly not equitable to require the return of a partial abstract system worth $900 in place of mere blank books worth $48, especially when the $48 has been paid and the blank books may be easily duplicated.

Even in actions at law like replevin this court has held that, where the value of the property is sought to be recovered, only the value before it was improved by defendant's labor and skill can be recovered where the improvements were made by defendant under a good-faith belief in his title. *Hunger-*

ford v. Redford, 29 Wis. 345. We conclude that there can be no recovery of the books on this ground.

As to the claim to recover half of the fees received by the defendant for making abstracts during the first quarter of the year 1910, we conclude that the circuit court rightly denied a recovery in this action. The plaintiff brought its action in equity, stating all the facts which it claimed entitled it to the purely equitable relief by way of injunction and surrender of the books. Among these facts were certain facts which it is claimed entitled it to relief by way of recovery of half the money received by the defendant for abstracts; but these were not stated as a separate cause of action, but only as incidental to the main equitable relief by injunction, under the familiar principle that where equity takes hold of a given situation and affords equitable relief it will in the same action give relief for all claims incidental to the main equitable cause of action. *Swihart v. Harless,* 93 Wis. 211, 67 N. W. 413.

Under the decisions of this court there are two well defined cases where a plaintiff who has planted his suit in equity and failed to sustain it may be given purely legal relief if the proof shows that he has a good cause of action at law therefor: first, where a cause of action in equity once existed and is stated in the complaint, but, because of the happening of some event for which the plaintiff is not responsible, it no longer exists (*Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75); second, where, although a cause of action in equity never in fact existed, the plaintiff alleges a good cause of action in equity, in good faith believing it capable of proof, but fails to prove some fact essential to a recovery in equity because such fact never existed. *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81. In both cases, however, the complaint *must state a good cause of action in equity,* and the plaintiff must in good faith believe it to exist at the time.

In the present case no cause of action in equity ever existed

and none was stated in the complaint. On the face of its complaint the plaintiff was never entitled to equitable relief of any kind, hence the case does not fall within either of the classes above mentioned. The cause of action for the fees is in form a cause of action at law for money had and received. *Barchent v. Snyder,* 128 Wis. 423, 107 N. W. 329. The defendant would be entitled to trial thereof by jury. A court of equity could only hear and determine it by reason of consent of the parties or because it was so closely connected with an equitable cause of action that it could be rightly considered as incidental thereto and hence could be considered and decided therewith. Where there never has been an equitable cause of action, and none is even stated in the complaint, this reason utterly fails. We deem the dismissal of the entire complaint, therefore, the best and most logical administration, but this is not to be understood as in any way prejudicing an action at law to recover the alleged fees.

It seems fair to presume that no such action will be necessary. The rights of the parties in the books being now settled, there seems no reason why the defendant should not pay over the county's share of the fees and obviate further litigation. He stated in his communication to the county board of April 1, 1910, that he was prepared to pay over one half of his earnings for abstract work for the preceding quarter as soon as he was "properly advised in the premises." There ought to be no need of further lawsuits and we assume there will be no such need.

By the Court.—Judgment affirmed.

DRAPER, Respondent, vs. WILSON, Appellant.

October 6—October 25, 1910.

Statute of frauds: Invalidity of contract not available to stranger.

The invalidity of a contract under the statute of frauds is a personal defense and is not available to one who is a stranger to the contract.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

This is an action of replevin for the recovery of six and one-tenth tons of hay. The action was commenced in justice's court. From a judgment in favor of the plaintiff appeal was taken to the county court, where judgment was also rendered in favor of the plaintiff.

One Frank Faestel was a tenant on the farm of *George Wilson,* the defendant. When his term was about to terminate he sold a number of articles on the farm to *Wilson,* among which was, as designated in the bill of sale, "hay in barn and cow barn." This sale was concluded on November 3, 1906. *Wilson* claims that he bought all of the hay on the farm which was owned by Faestel. Faestel denies this, and testified that *Wilson* bought only the hay in the west mow of the large barn and the hay in the cow barn. Immediately after the sale of the hay to *Wilson,* Faestel made an oral agreement with the plaintiff, *Draper,* for the sale of the hay in the east mow of the large barn. This was estimated at six and one-half tons, of the value of $61. No written agreement was made by Faestel and *Draper,* nor did *Draper* pay anything on the sale until the latter part of December. *Draper* testified that he went to the farm several times to see *Wilson* and to make arrangements for carrying away the hay he had bought, but that *Wilson* was away and that he did not see him until about February 1, 1907, the day before he commenced this action, when he made a demand for the hay, and

that *Wilson* prohibited his taking it and claimed to have purchased all of the hay in the two barns from Faestel. The sheriff seized about 1,800 pounds of hay which was in the east mow of the barn.

This is an appeal from the judgment for $36 and costs in favor of the plaintiff, *Draper*, the court holding on the evidence that the defendant had not purchased the hay claimed by the plaintiff, and that the defense that the contract of sale between Faestel and *Draper* was void under the statute of frauds was not available to the defendant, *Wilson*, because he was a stranger thereto.

The cause was submitted for the appellant on the brief of *Carl B. Rix*, and for the respondent on that of *G. Holmes Daubner*.

SIEBECKER, J. The evidence is ample to sustain the court in the conclusion negativing the claim of the defendant that he had purchased the hay in controversy from Faestel, the former tenant of the farm, and hence this finding must stand. From this verity in the case it follows that the defendant was a stranger to the alleged agreement of sale of hay by the tenant to the plaintiff and that he was not a privy as to its ownership. He had merely permitted the tenant to leave the hay on the premises for some time at the tenant's request.

Defendant, however, seeks to interpose the defense that the plaintiff's contract for the purchase of the hay is void under the statute of frauds because no note or memorandum thereof was made in writing nor was a part of the purchase money then paid. The tenant and the plaintiff both acquiesced in the contract before the court and volunteered performance. The question presented is whether the defendant, a stranger to this contract, can plead the defense of invalidity of the contract of sale under the statute of frauds. We deem it established by reason and authority that the defendant has no such interest in the contract and its subject matter, under the

circumstances here shown, as to authorize him to plead this defense. Such a statutory defense is held to be personal and is not one available to strangers to such agreements. The rule has been well stated as follows: "Like usury, infancy, and a variety of other defenses, it can only be relied upon by parties or privies." *Chicago D. Co. v. Kinzie,* 49 Ill. 289; *Rickards v. Cunningham,* 10 Neb. 417, 6 N. W. 475; *Cowan v. Adams,* 10 Me. 374, 25 Am. Dec. 242; *Christy v. Brien,* 14 Pa. St. 248. This rule would seem to be necessary to preserve to parties to such a contract the right to voluntarily waive the statute and perform the contract, as was declared they had the right to do by this court in *Whiting v. Gould,* 2 Wis. 552; *Godden v. Pierson,* 42 Ala. 370.

The court properly awarded judgment for the plaintiff.

By the Court.—Judgment affirmed.

ESTATE OF BULLEN: THE STATE and another, Respondents, vs. BULLEN and others, Appellants.

THE STATE, Appellant, vs. BULLEN and others, Respondents.

October 6—October 25, 1910.

Inheritance tax: Transfer "in contemplation of death:" Situs of personalty: When liability to tax accrues: Life insurance policies payable to wife: Statutes: Construction.

1. The inheritance tax imposed by ch. 44, Laws of 1903, is a tax upon the right to receive property,—in other words, a tax on the transfer or transaction, not on the property itself.
2. For the purposes of the inheritance tax law, personal property has its legal situs at the domicile of the decedent, and the state has power to impose a tax upon the succession or transfer thereof, where the decedent is a resident of the state, although the property was never within the state and although the transfer was made outside of the state.

3. One B., formerly a resident in Chicago, came to this state to reside some sixteen years before his death, but continued until his death to transact some business in Chicago, where the major part of his personal estate, in the form of moneys deposited in checking accounts in Chicago banks, stocks, bonds, notes, and insurance policies, always remained. About four years prior to his death he executed in Chicago, to an Illinois trust company, a conveyance of all said personal estate, in trust for the use of himself, his wife, and certain relatives, nonresidents of this state, during life, and upon his death for the equal benefit of his four sons, among whom the principal was eventually to be divided. At the time of making said trust conveyance B. was afflicted with locomotor ataxia and was aware of the fact. The trust conveyance reserved to the grantor the right to direct and control the distribution of the trust estate and to revoke and vacate the trust at any time during his life, and he received during his lifetime the entire net income from the trust estate. Having technically repossessed himself of the securities for a brief period, by a direction to the trust company to hold them for him instead of under the trust, B., about one year before his death, executed a further assignment in trust confirming and re-establishing the original trusts; but the manual possession of the securities remained at all times with the trust company, and the legal title was vested in it at the time of B.'s death. Prior to B.'s death the trustee made return of the property to the tax assessors of Illinois and paid the taxes levied thereon in that state, and after his death it paid an inheritance tax in Illinois upon all of said property. *Held*, that said conveyance in trust was made "in contemplation of death," and was "intended to take effect in possession or enjoyment after such death," within the meaning of ch. 44, Laws of 1903; and the property, though never brought within this state, must be regarded as having its situs here and must pay the inheritance tax imposed by the laws of Wisconsin.

4. In such case the liability accrued at the time of the transfer and is therefore not affected by the fact that at the time of the grantor's death the trust property was in another state, with the legal title in a nonresident trustee.

5. A life insurance policy payable to decedent's wife and which she joined with him in conveying to the trust company, though without relinquishing her rights therein, formed no part of his estate and hence was not subject to the inheritance tax.

6. A statute adopted from another state is taken with the judicial construction which it had previously received in that state.

Appeals from a judgment of the circuit court for Waukesha county: Martin L. Lueck, Circuit Judge. *Affirmed.*

The circuit court for Waukesha county fixed an inheritance tax upon the estate of George Bullen, deceased, at $20,184.71. The *Bullen* heirs and the state appealed, which appeals were heard together. It appears from the established facts that George Bullen, a citizen of Wisconsin, died at his home near Oconomowoc September 10, 1908, aged sixty-two years. He left a widow and four sons, three of whom are minors. At the time of his death he had on deposit in checking accounts in Chicago banks $12,109.77, and was possessed of his home known as "Minnewoc" in Waukesha county, valued at $56,000, and the chattels appurtenant thereto, agreed to be worth $20,000. The remaining property in which Mr. Bullen had any interest prior to his death consisted of certain stocks, bonds, notes, life insurance policies, etc., the title to which was vested in the Northern Trust Company, an Illinois corporation, as trustee, for the benefit of *Mrs. Bullen* and her four sons, who now appeal, and of Lucy E. Cleghorn, Annie Graham, Mary T. Harris, Victoria Bullen, and Helen Mary Harris, all nonresident aliens. They did not, nor did the Northern Trust Company, appear in either of the courts below or join in this appeal. No personal service was ever had on any of them. The Illinois property held by the Northern Trust Company, exclusive of the $25,000 insurance policy, was valued at $936,761.70. In 1892 Mr. Bullen, who formerly lived in Chicago, moved to Oconomowoc, but continued to transact some business in Chicago down to the time of his death. In 1900 he began negotiations with the Northern Trust Company with a view of transferring his property to it under a trust agreement. Various drafts of the instrument were made and discussed by the parties down to December 11, 1902, when an agreement denominated "an assignment in trust" was entered into in Chicago, and the bonds, stocks, notes, insurance policies, and other securities

therein mentioned were delivered to the trust company. The transfer of the securities was made on the date last mentioned by the delivery to the Northern Trust Company of the assignment in trust, together with the securities themselves. Such of the securities as did not pass by delivery were also assigned by independent instruments, such as the usual indorsement on a stock certificate and the usual form of assignment of insurance policy. The trust assignment was dated December 11, 1902, and the receipt of the Northern Trust Company appended to it bears the same date. A certificate of acknowledgment, however, was made afterwards on April 4, 1903. These securities had always been in a safety-deposit box in Chicago, and the legal title to them was held by the trustee at the time of Mr. Bullen's death, and the securities themselves had never been within the state of Wisconsin.

The assignment in trust provided for the investment and reinvestment of the trust estate, and directed the payment of $900 per annum to Lucy E. Cleghorn, a niece, and $900 per annum to Annie Graham, a sister, both of whom resided out of the United States at the time of Mr. Bullen's death. It directed the trustee to pay the cost of maintenance of a house in London, Canada, during the lives of Mr. Bullen's two sisters, Mary T. Harris and Victoria Bullen, and his niece Helen Mary Harris. It directed the trustee to hold his house and farm known as "Minnewoc" and the chattels appurtenant thereto, and to spend the necessary amount in maintaining them, for the benefit of *Mrs. Bullen* and the children. It gave to *Mrs. Bullen* for life one third of the remainder of the income from the trust estate, and directed that the other two thirds should be paid to Mr. Bullen during his lifetime and after his death should be set apart for his four sons; and it directed the distribution of the principal to the sons, each to have one third of his share when he should reach the age of twenty-five years, and the other two thirds when he should reach the age of thirty years. It reserved the right to direct

and control the distribution of the trust property and to revoke and vacate the trust at any time during Mr. Bullen's lifetime.

Mr. Bullen, having technically repossessed himself of the securities for a brief period, executed a further assignment in trust, dated May 22, 1907, but the manual possession of the securities had remained at all times since 1902 with the Northern Trust Company, Mr. Bullen having repossessed himself of them merely by directing the trust company to hold them for him as his agent instead of trustee. Prior to the death of George Bullen the Northern Trust Company made returns to the tax assessors of Cook county, Illinois, of the value of the trust estate, and paid the taxes thereon levied on the valuation made by said assessors. The trust company also paid, after Mr. Bullen's death, an inheritance tax on all of said property in Illinois, including the bank deposits. When the assignment in trust was drawn Mr. Bullen was suffering from locomotor ataxia and was aware of the fact. *Mrs. Bullen* was also in ill health; and the fourteenth paragraph of the trust agreement declares the intention of giving the trustee "full power and authority to manage the said trust estate for the benefit of the several beneficiaries thereof, particularly my said wife during her lifetime, in the event I should be unable, at any time prior to my death, to give my affairs such attention as they may demand, and at all events, after my death, in like manner as I myself might or could manage it, if living and in good health." The sixteenth paragraph provides for the distribution of any trust estate not specifically disposed of, "among my heirs at law, as provided by the laws of Illinois with reference to intestate property, and the laws of said state shall govern in the interpretation of this instrument." In addition to the personal property which passed under the assignment in trust there was certain real estate, one parcel of which, "Minnewoc," Mr. Bullen's residence, is located in Wisconsin. *Mrs. Bullen* declined to

sign the deeds of the real estate, refusing to relinquish her dower and other rights therein, unless Mr. Bullen should make some provision in the trust assignment for an income for her mother. *Mrs. Bullen* refused at first to assign the insurance policy for $25,000, and the policy, being payable to her, could not be transferred without her consent. She finally reached an agreement as to this policy with Mr. Bullen and executed the assignment of it. The deeds having never been signed, the deed of "Minnewoc" to the trustee did not pass the homestead rights. The Northern Trust Company, having no right to do business in Wisconsin, has confined itself to the trust estate delivered to it in Illinois, and has avoided coming within the jurisdiction of this court. The only interested parties over whose persons the court has jurisdiction are *Mary Lenore Bullen* and her four sons, the three minors appearing through Mr. Newbury, their guardian *ad litem.*

For the *State of Wisconsin* there was a brief by the *Attorney General, Russell Jackson,* deputy attorney general, and *A. C. Titus,* first assistant attorney general, and oral argument by *Mr. T. W. Haight, Mr. Jackson,* and *Mr. Titus.*

For the appellants *Mary Lenore Bullen* and others there were briefs by *Montgomery, Hart & Smith* and *Frame & Blackstone,* attorneys, and *C. W. Newbury,* guardian *ad litem,* and oral argument by *J. R. Montgomery* and *H. J. Frame.* They cited, among other cases, *In re Joyslin's Estate,* 76 Vt. 88; *State Tax on Foreign-held Bonds,* 15 Wall. 300; *Gibson v. Conn. F. Ins. Co.* 77 Fed. 561, 565; *Metropolitan L. Ins. Co. v. New Orleans,* 205 U. S. 395; *People v. Griffith,* 245 Ill. 532; *In re Taxation of Masury's Estate,* 51 N. Y. Supp. 331, affirmed 159 N. Y. 532; *Estate of Keeney,* 194 N. Y. 281; *In re Cummings' Estate,* 118 N. Y. Supp. 684; *Neilson v. Russell,* 76 N. J. Law, 27, 69 Atl. 476.

KERWIN, J. We shall first consider the appeal on the part of the *Bullen* heirs. Counsel say in their brief that there is

but one question for determination by this court, namely: "Can the state of Wisconsin tax a contract made by one of its residents when in a foreign state, whereby he transfers property which is then in the foreign state and which never has been in the state of Wisconsin, even though constructively the transfer was 'intended to take effect in possession or enjoyment at or after the death of the transferor?' " It is argued that the tax is not a tax of property, but an excise tax imposed on the transfer, and, the transfer being made in a foreign state of property within that state, this state cannot tax such property held by the Northern Trust Company. It is said that the tax is "not a tax on the person who transmits, or the person who receives, but it is a tax on the right of transmission." This question was considered and discussed by this court in *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627, and the conclusion arrived at, after a review of the authorities, that inheritance taxes are not taxes upon property, "but upon the right to receive property." And in *Beals v. State,* 139 Wis. 544 (121 N. W. 347), at page 552, this court, referring to the *Nunnemacher Case,* said: "Inheritance taxation was held to be constitutional in the *Nunnemacher Case* on the ground that it is excise taxation levied on the transfer of property and not on the property itself. . . ." And in summing up the points decided the court said: "The inheritance tax levied by ch. 44, Laws of 1903, is not a tax upon property or property rights in any sense, but purely an excise tax levied upon the 'transfer' or transaction, and merely measured in amount by the amount of property transferred." Again, in *State v. Pabst,* 139 Wis. 561, 121 N. W. 351, the rule laid down in the *Nunnemacher* and *Beals Cases* was referred to and approved. The tax, therefore, under the decisions of this and other courts is a tax upon the transfer, transaction, or right to receive property. *Nunnemacher v. State, supra; Beals v. State, supra.* The theory of an inheritance tax is that it is not one on property, but upon the right of succession. 27

Am. & Eng. Ency. of Law (2d ed.) 338; *State v. Pabst, supra.*

But it is strenuously argued by counsel for the heirs that the property taxed being in the state of Illinois, and the transfer from Bullen to the Northern Trust Company having been made in the state of Illinois and outside of the state of Wisconsin, the Wisconsin inheritance tax law does not reach such property. This contention involves the question of the situs of the property of Bullen transferred to the trust company and the application of our inheritance law to such situation. The following provisions of the inheritance law of this state—sec. 1087—1, Stats. (Supp. 1906: Laws of 1903, ch. 44, sec. 1; Laws of 1903, ch. 249, sec. 1; Laws of 1905, ch. 96, sec. 1)—are pertinent to the present inquiry:

"A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, except county, town or municipal corporations within the state, for strictly county, town or municipal purposes, and corporations of this state organized under its laws solely for religious, charitable or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization, within the state, in the following cases:

"(1) When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

"(2) When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death.

"(3) When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.

"(4) Such tax shall be imposed when any such person or corporation becomes beneficially entitled, in possession or ex-

pectancy, to any property or the income thereof, by any such transfer whether made before or after the passage of this act; provided, that property or estates which have vested in such persons or corporations before this act shall take effect, shall not be subject to a tax; and provided further, that contingent interests created by the will of any person who died prior to the passage of this act shall not be taxed."

This statute was borrowed from New York; therefore the judicial construction given it there is significant in interpreting it here. *Draper v. Emerson,* 22 Wis. 147; *Westcott v. Miller,* 42 Wis. 454; *Dutcher v. Dutcher,* 39 Wis. 651; *Pomeroy v. Pomeroy,* 93 Wis. 262, 67 N. W. 430.

"It is a settled rule in the construction of statutes, that where a statute has received a judicial construction in another state, and is then adopted, it is taken with the construction which has been so given it." *Draper v. Emerson, supra.*

Prior to its adoption here the statute received judicial construction in New York, and it was held that in respect to personal property not within the state at the time of the resident decedent's death the court will apply the maxim *Mobilia sequuntur personam. Estate of Swift,* 137 N. Y. 77, 32 N. E. 1096; *Estate of Cornell,* 170 N. Y. 423, 63 N. E. 445. The effect of this rule is to make the legal situs of the property at the domicile of the decedent. As we have seen, Mr. Bullen reserved the right to direct and control the distribution of the trust property and to revoke the trust at any time during his life, and received during his lifetime the entire net income from the trust estate held by the Northern Trust Company. The trust agreement contains the following clause:

"Fifth. I, the donor, expressly reserve the right to direct and control the disposition of the said trust property and estate, to revoke and vacate this trust at any time during my life, to enter into and upon and take possession of the same, or any part thereof, to require a reconveyance to me of the said trust property, or any part thereof, and to dispose of it as I may see fit. During my lifetime the principal and in-

come shall be used for such beneficiaries and in such manner as I may from time to time appoint, and in default of any appointment during my lifetime, and, at all events, after my death, the same income and the said principal shall be applied, paid over or held as herein provided."

We think under the authorities and the established facts in this case that the situs of the property covered by the trust agreement was in the state of Wisconsin, where Bullen lived and died, and was subject to the Wisconsin inheritance tax. *Estate of Swift, supra; Estate of Cornell, supra; In re Corning's Estate,* 3 Misc. 160, 23 N. Y. Supp. 285; *Frothingham v. Shaw,* 175 Mass. 59, 55 N. E. 623; *Ford v. Ford,* 70 Wis. 19, 33 N. W. 188. It is true there is some conflict of authority on the point. Counsel for the heirs in their briefs cite us to *In re Joyslin's Estate,* 76 Vt. 88, 56 Atl. 281, which appears to be out of harmony with the rule laid down in New York and Massachusetts. We feel constrained to hold to the New York and Massachusetts rule. In *Frothingham v. Shaw,* 175 Mass. 59, 55 N. E. 623, the court holds the general rule to be that personal property for the purpose of taxation has its situs at the domicile of the owner; and although this rule leads to double taxation, that has not been accounted a sufficient objection to taxation of personal property to the owner during his life at the place of his domicile, nor sufficient objection to the imposition of succession taxes after his death.

In *Estate of Swift, supra,* there is a full discussion of the subject, and the court concludes that as to personal property of a resident decedent, wheresoever situated, whether within or without the state, it is subject to the tax imposed by the act.

In *Estate of Cornell, supra,* it was held that a gift of securities, under an agreement that the donor should have during his life such part of the net income as he desired, but the donee to have possession and management of the securities, makes the donee the holder in trust until the death of the

donor, and such property is, therefore, taxable under the Laws of 1896, ch. 908, § 220, subd. 3, which provides:

"When the transfer is of property made by a resident or by a nonresident, when such nonresident's property is within this state, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect, in possession or enjoyment, at or after such death. Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act. . . ."

See also *Estate of Brandreth,* 169 N. Y. 437, 62 N. E. 563. In *Estate of Keeney,* 194 N. Y. 281, 87 N. E. 428, under the transfer tax law before referred to, the court said (page 287):

"It is a matter of common knowledge that for this purpose trusts or other conveyances are made whereby the grantor reserves to himself the beneficial enjoyment of his estate during life. Were it not for the provision of the statute which is challenged, it is clear that in many cases the estate, on the death of the grantor, would pass free from tax to the same persons who would take it had the grantor made a will or died intestate. It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with reservation of a life estate. We think this fact justified the legislature in singling out this class of transfers as subject to a special tax.

"It is also urged that the trust property was at the time of the intestate's death in another state with the legal title in the trustee. This does not affect the liability of the transfer to taxation. The liability in this case accrued at the time of transfer, no matter when imposed."

In the instant case Bullen reserved and enjoyed a life estate in the property transferred to the Northern Trust Company. Sec. 2443, Stats. (1898), provides that the jurisdiction of the county court extends to estates of all persons deceased who were at the time of their deaths inhabitants of or residents of the same county, or who shall die without the

state having any estate within such county to be administered. And by ch. 44, Laws of 1903 (the inheritance tax law), such courts are given authority to determine the inheritance tax which shall be paid by the estate of decedent. And in sec. 1087—24, Stats. (Supp. 1906: Laws of 1903, ch. 44, sec. 23), the words "estate" and "property" are defined to mean "the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor or donor passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, vendees or successors, and shall include all personal property within or without the state."

We think it quite clear, upon the established facts, that the transfer was made "in contemplation of death" within the meaning of the law (*State v. Pabst,* 139 Wis. 561, 121 N. W. 351), and was also "intended to take effect in possession or enjoyment at or after such death." Sec. 1087—1, subd. 3, Stats. (Supp. 1906: Laws of 1903, ch. 44, sec. 1); *Estate of Green,* 153 N. Y. 223; *Estate of Brandreth, supra; Estate of Cornell,* 170 N. Y. 423, 63 N. E. 445; *Estate of Keeney,* 194 N. Y. 281, 87 N. E. 428. We conclude that the property covered by the trust agreement was subject to the inheritance tax.

The only error urged on the state's appeal is, that the $25,000 insurance policy assigned to the trust company should have been taxed. It appears that this policy was made payable to *Mrs. Bullen* as beneficiary, and no right reserved in it or otherwise to change the beneficiary. It was assigned to the trust company, but it does not appear that *Mrs. Bullen* relinquished her rights therein; therefore this property remained the property of *Mrs. Bullen* and was not a part of Mr. Bullen's estate. The court below, therefore, was right in refusing to tax it.

Some other points are made on both appeals, but from the view we take of the case consideration of them is unnecessary.

By the Court.—The judgment of the court below is affirmed on both appeals.

Thomas, Respondent, vs. McKay, Appellant.

October 6—October 25, 1910.

Cancellation of deed: Pleading: Title to land: Descent: Homestead: Equity: Ejectment.

1. In an action by one claiming as an heir of his father to set aside an instrument purporting to be a deed executed by the father in his lifetime conveying land "which was his homestead" to defendant (a daughter), a complaint which fails to state whether the father died testate or intestate or that he had an estate of inheritance in the land at the time of his death, and fails to describe the land definitely, but shows that defendant, not plaintiff, was in the possession thereof, is fatally defective.
2. An averment that the land in question was the father's homestead does not show that the father had an estate of inheritance therein.
3. If, as alleged, defendant was in possession under a deed recorded, but never delivered, the action should be in ejectment.
4. A deed is not rendered void by mere failure of the grantee to carry out certain promises named therein as consideration for the conveyance.

Appeal from an order of the circuit court for Waukesha county: Martin L. Lueck, Circuit Judge. *Reversed.*

The appeal is from an order overruling a general demurrer to each alleged cause of action in the complaint.

For the appellant there was a brief by *Page & Ferris,* and oral argument by *J. W. Page.* Among other authorities, they cited *Beranek v. Beranek,* 113 Wis. 272, 89 N. W. 146; *Van Hessen v. Chippewa Valley M. Co.* 115 Wis. 443, 91 N. W. 1008; *Franklin v. Kirby,* 25 Wis. 498; *Miller v. Bayer,* 94 Wis. 123, 68 N. W. 869; *Gray v. Tyler,* 40 Wis. 579; *Mash v. Bloom,* 133 Wis. 646, 114 N. W. 457; *Lawson v. Menasha W. W. Co.* 59 Wis. 393, 18 N. W. 440; *Rogers v. Milwaukee,* 13 Wis. 610; *Ahlhauser v. Doud,* 74 Wis. 400, 43 N. W. 169; *Denner v. C., M. & St. P. R. Co.* 57 Wis. 218, 15 N. W. 158; *Donnelly v. Eastes,* 94 Wis. 390, 69 N. W. 157; *Bogie v. Bogie,* 41 Wis. 209.

For the respondent the cause was submitted on the brief of *Benjamin F. Saltzstein,* attorney, and *Michael Levin,* of counsel. They cited, besides other cases, *Johnson v. Harrison,* 41 Wis. 381; *Howe v. McGivern,* 25 Wis. 525; *Brauns v. Green Bay,* 55 Wis. 113, 12 N. W. 463; *Krakow v. Wille,* 125 Wis. 284, 103 N. W. 1121; *Plainfield v. Plainfield,* 67 Wis. 525, 30 N. W. 673; *Dishneau v. Newton,* 91 Wis. 199, 64 N. W. 879; *Morse v. Gilman,* 16 Wis. 504; *Carey v. C. & N. W. R. Co.* 67 Wis. 608, 31 N. W. 162; *Ean v. C., M. & St. P. R. Co.* 95 Wis. 69, 69 N. W. 997; *Gibson v. Gibson,* 46 Wis. 449, 1 N. W. 147; *Morrow v. Lawrence Univ.* 7 Wis. 574.

TIMLIN, J. The complaint averred that on December 26, 1898, William H. Thomas of the county of Waukesha died leaving surviving him no widow but several children, among whom were the plaintiff and defendant. January 3, 1899, there was recorded in the office of the register of deeds a deed from said William H. Thomas conveying the property described therein, *which was his homestead,* to the defendant, *McKay,* and a copy of this deed is annexed to and made a part of the complaint. It bears date September 11, 1897, states that it is in consideration of one dollar and "love and affection, the payment of my just debts and funeral expenses, the placing of a proper gravestone in the center of my burial lot in the village of Pewaukee, properly engraved with my name, age, the rank, company, and regiment in which I served during the late war." Description: "A lot of land in the southwest quarter of section 9, township 7 north, of range 19 east. This deed to be put on record after my death." Otherwise it is a proper warranty deed. It is next averred that the deed was never delivered; that immediately after the death of her father defendant entered into possession of said property, and although she lives in Walworth county she has ever since claimed and does still claim the exclusive ownership thereof, and has rented the land and enjoyed the profits therefrom.

The second cause of action repeats and alleges as part thereof the foregoing, and further avers that the defendant has failed to carry out "certain of the promises named in said instrument as the consideration for said conveyance, and in particular that she never paid the just debts and funeral expenses of the grantor," nor has she ever placed a gravestone on the burial lot described, and concludes that therefore the alleged deed is no longer of any effect and is void. Plaintiff then avers argumentatively many reasons why he did not bring the action earlier. Upon this he demands judgment that the alleged deed be set aside and be declared null and void and for general relief.

The first alleged cause of action with all its imperfections is carried into and made part of the second. There is no averment that plaintiff's ancestor had at the time of his death any estate of inheritance in the land. There is no averment that he ever owned the land. We are asked to infer that the decedent owned the land because there is an averment that it was his homestead. But by law of this state (sec. 2983, Stats. 1898) there may be a homestead in a leasehold interest terminable at or prior to the death of the holder. The inference that there was an estate of inheritance from such an averment is therefore impossible. Next, the complaint not only fails to show that the plaintiff is in possession of the land or that the land is vacant and unoccupied, as required by sec. 3186, Stats. (1898), but it affirmatively shows that the defendant is in possession, hence that the plaintiff's remedy is by ejectment.

Defects in the complaint: (1) It should be stated whether the deceased died testate or intestate, and if testate who were the devisees in his will. (2) It should be stated that he was seised of an estate of inheritance in this property at the time of his death. (3) The real estate should be described. (4) If the suit remains in equity, and if the averments of discovery are to avail the pleader as against the statute of limi-

tations, he must with these averments state a case for relief on the ground of fraud. (5) A deed is not rendered void merely because the grantee "failed to carry out certain of the promises named in said instrument as consideration for said conveyance." (6) The action must be in ejectment if the defendant is in possession personally or by tenant under a deed recorded but never delivered.

By the Court.—The order overruling the demurrer is reversed, and the cause remanded for further proceedings according to law.

NORTHWESTERN PORT HURON COMPANY, Respondent, vs. KRUBSACK and another, Appellants.

October 7—October 25, 1910.

Sales: Warranty: Failure to give stipulated notice of dissatisfaction.

A contract under which a corn shredder was sold, providing that if the purchaser was not satisfied with the machine after it had been put in order by an expert he must, in order to obtain the benefit of the warranties, notify the vendor within three days by registered mail that he was not satisfied and that he demanded a competitive trial, and providing also that all warranties except as to free repairs should be considered as fully satisfied unless the purchaser promptly gave such registered notice, and that no oral notice should be substituted therefor,—was plain and unambiguous, and when the purchaser failed to give such stipulated notice he became remediless as to the warranties.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

This action is brought on a promissory note. The defendant *Labs* signed the same as principal and the defendant *Krubsack* as guarantor. The note was given for a corn shredder purchased by the defendant *Labs* from the plaintiff. The defense interposed was that the machine was sold

under a warranty as to material, workmanship, and efficiency; that the machine did not comply with the contract of warranty; that the purchaser duly rescinded the same; and that the consideration for the note in suit had wholly failed. The defendant *Labs* also counterclaimed for damages for freight paid and money expended in endeavoring to get the machine to work, and for loss of profits. The jury returned a special verdict in the case, upon which judgment was entered for the plaintiff. The other material facts will be found in the opinion.

For the appellants there was a brief by *Agnew & Evans*, and oral argument by *N. W. Evans*.

John A. Kelly, for the respondent.

Barnes, J. The special verdict in this case contained twenty questions, but one of which was answered in favor of the plaintiff. The unusual thing happened, however, in that plaintiff was awarded judgment on the verdict. By the answer to this question it was found that the defendant *Labs* did not send a notice to plaintiff by registered mail demanding a competitive trial between the machine purchased and some other machine which he might select. The appellants contend (1) that the evidence is insufficient to support this finding of the jury, and (2) that in any event they are entitled to judgment on the verdict.

1. In reference to the first contention, it may be said that *Mr. Labs* testified positively that he mailed the notice and that the evidence to the contrary is rather weak. But no copy of the letter was produced. The registry receipt received when the notice was mailed was not produced, and neither was the return receipt or the record at the postoffice in reference to the registered letter. In addition to this, an employee in the mailing department of the plaintiff testified that no such notice was received. This court cannot say that

the jury was not warranted in finding as a fact from this evidence that *Labs* did not mail the notice.

2. The corn shredder was sold under a warranty that it would "shell as little and husk as fast, doing the work well, and properly shredding the stalks, as any husker-shredder in the world." The machinery was also warranted to be first class in materials, workmanship, and finish. The contract then provided that if at the end of the first day's use the purchaser was unable to operate the machine well, immediate notice was to be given by registered letter to the plaintiff, stating wherein the machine failed to fulfil the warranty. The plaintiff on its part agreed, on receipt of such notice, to send an expert to put the machine in first-class running order. If the purchaser was not satisfied with such machinery after it was put in order by the skilled workman sent for that purpose, then, in order to obtain the benefit of the warranties, the purchaser was obliged within three days thereafter to notify the plaintiff by registered mail that he was not satisfied with the machine and that he demanded a competitive trial. If on such trial the machine failed to comply with the warranty, the plaintiff agreed that the contract should be rescinded and the machine taken back and the purchase price refunded to the purchaser. The contract of warranty also contained the following clause:

"All of the warranties except as to free repairs shall be considered as fully satisfied unless the purchaser promptly gives the registered notices herein required, and it is expressly agreed that six days' retention from the first day's use of said machinery shall be conclusive evidence of the fulfilment of these warranties," etc.

The machine did not work to the satisfaction of the purchaser and the plaintiff was notified to that effect. The agent who sold the machine first attempted to put it in satisfactory running order, and thereafter an expert came from the factory for the same purpose and concluded his work on

November 26th. *Mr. Labs* testified that on November 28th he sent the notice referred to by registered mail. The finding of the jury makes it a verity in the case that the notice demanding a competitive trial was not sent.

But it is argued that it was unnecessary to give this notice in writing because it was given orally to plaintiff's expert; because the machine was not in fact put in order as contemplated by the warranty; because the plaintiff's agent on November 26th agreed to send certain repairs for the machine; and because the testimony showed that the machine was practically worthless. These claims are not entirely consistent with each other. The testimony shows, without contradiction, that the machine was run the greater part of November 26th under the direction of the expert. The parties do not disagree as to what transpired at the close of the day. *Labs* claimed that the machine did not fulfil the warranty and that he was not satisfied with it. The company's expert, on the contrary, claimed that the machine was all right and that it belonged to the defendant. The defendant testified that he told the agent of the plaintiff that if this was his position he would rig up an old shredder which he had and ask for a competitive trial. The evidence clearly shows a situation where one of the parties claimed that the warranty was complied with and the other claimed that it was not. The precise situation was presented which the warranty contemplated. If the purchaser was dissatisfied with the work which the machine did, his contract required him to give a notice within three days demanding a competitive test. In the event of his failure to give such notice he became remediless under the terms of his contract. The evidence fails to disclose that the plaintiff admitted that the machine was not in condition to enter into a competitive trial or that the extra pieces which were to be sent were at all necessary in order that such trial should be made. The evidence is very vague as to the character of the pieces of machinery that were to be

sent, but leaves the impression that they were merely extra parts to be used in case of breakdowns. The contract of warranty here involved is one that looks reasonable enough on its face, but is one under which it is very difficult for a purchaser to protect himself in the event of his being supplied with a worthless machine. However, courts cannot make contracts for parties, and where contracts, such as the one under consideration, are plain and unambiguous, it is the duty of the courts to enforce them. It seems clear that it was incumbent upon the defendant *Labs,* if he desired to protect himself, to give the notice by registered mail called for by the contract. That contract specifically provided that no verbal notice given to any agent or representative of the company should conclude it or should take the place of or be a substitute for the written notice called for by it. Neither of the points relied on for reversal of the judgment is well taken.

By the Court.—Judgment affirmed.

BOYD and another, Respondents, vs. GORE, Executor, Appellant.

October 7—October 25, 1910.

Evidence: Transactions with persons since deceased: Depositions taken before death: Landlord and tenant: Eviction: Voluntary surrender: Counterclaim.

1. **Testimony as to personal transactions with a person since deceased, inadmissible under sec. 4069, Stats. (1898), is not rendered admissible by the fact that it was taken by deposition before the death of such person.**
2. **Where the landlord had objected to a tenant remaining on a farm, because the latter got into debt, and had told the tenant that he would better leave because he could not carry on the place, acquiescence and removal by the tenant and acceptance and resumption of possession by the landlord do not show an eviction, but a voluntary surrender.**

3. Where a voluntary surrender of leased premises is accepted by the landlord, all liabilities under the lease which would arise in the future had no surrender taken place are terminated, but liabilities which have already accrued remain unaffected.
4. In an action by the assignees of a claim, a counterclaim against their assignor upon which they are not personally liable can be allowed only so far as it offsets the claim sued upon.

Appeal from a judgment of the circuit court for Dodge county: Martin L. Lueck, Circuit Judge. *Reversed.*

This is an action to recover certain sums which the plaintiffs claim as assignees of one Coller. The defendant by counterclaim seeks to offset against the plaintiffs' claims certain demands which he claims existed in his favor against Coller at the time the assignment was made. The action was tried by the court, trial by jury having been waived. It appeared that October 1, 1906, William Gore, the defendant's testator, leased by a written agreement his farm of 160 acres to one Coller, the plaintiffs' assignor, for one year upon shares; that the lease was modified in certain particulars immaterial here in June, 1907, and when it expired, October 1, 1907, was renewed for the year; that in March, 1908, Coller for some reason vacated the premises and Gore took possession and placed a new tenant therein. Coller claimed that when he quit possession of the premises the defendant owed him, among other items, the following:

For plowing done in the fall of 1907	$85 50
For cash received by Gore for milk belonging to Coller	80 00
For chores done by Coller at Gore's request	6 00
Total	$171 50

Immediately after quitting the premises Coller sold his demand for these sums with others to the plaintiffs, and thereupon they brought this action against Gore on the 29th of April, 1908. Gore died September 20, 1908, and on the 28th of November following, upon proper motion, the action was revived against the present defendant as executor of

William Gore's will. The defendant's counterclaim consisted, among other charges, of a charge for Coller's failure to draw out the manure upon the farm during the winter of 1907–1908, amounting to $75, and a further charge for a small quantity of pork furnished to Coller of $1.90. The remaining charges are unnecessary to be stated, as they have no bearing upon the issues of this appeal. The trial court found that Gore owed Coller the following sums:

Money received for milk	$45 00
Amount due for chores	6 00
Amount due for plowing in the fall of 1907	67 50
Total	$118 50

The court further found that Coller owed Gore for pork furnished $1.90, and disallowed all other claims on the part of the defendant, leaving a balance due to the plaintiffs of $116.60, for which judgment was rendered, and from which judgment this appeal is taken.

The cause was submitted for the appellant on the brief of *R. D. Tillotson*, and for the respondents on that of *C. E. Hooker*.

WINSLOW, C. J. The appellant makes no objection to the items of $45 and $6 allowed by the court to the plaintiffs for milk money received by Gore and for chores. There are but two items in dispute on this appeal necessary to be considered, namely, the item of $67.50 allowed by the court to the plaintiffs for plowing done by Coller in the fall of 1907, and the item of $75 claimed by defendant as damages for Coller's failure to draw out the manure during the winter, which latter item was disallowed by the court. It was Coller's duty under his lease to do both of these things; hence it is plain that he can neither recover for his plowing nor escape liability for his failure to draw out the manure, unless he was excused from compliance with the provisions of his lease by some extrinsic fact.

The trial court found in effect that he was evicted by the defendant's testator in March, 1908, and from this premise he concluded that Coller was entitled to recover for the plowing already done in preparation for the season of 1908. He also found that Mr. Gore, the testator, told Coller that he need not draw out the manure in the winter. Both of these findings were based upon the testimony of Coller detailing conversations which he had with Mr. Gore prior to his death. This testimony was objected to, and was of course inadmissible under the provisions of sec. 4069, Stats. (1898) (which excludes the testimony of a party or one under whom he derives title with respect to personal transactions with a deceased person under whom the opposing party claims), unless the fact that Coller's testimony was in the form of a deposition taken before Gore's death makes the statute inapplicable.

There has been some difference of opinion among the courts upon this question, and it seems clear that the great weight of authority is to the effect that the statute is still applicable and the testimony inadmissible. 12 Ency. of Ev. 733, 734, note 82; *Park v. Lock,* 48 Ark. 133, 2 S. W. 696; *Smith v. Billings,* 177 Ill. 446, 53 N. E. 81; *Quick v. Brooks,* 29 Iowa, 484; *Hardin's Adm'r v. Taylor,* 78 Ky. 593; *Messimer v. McCray,* 113 Mo. 382, 21 S. W. 17; *St. Clair v. Orr,* 16 Ohio St. 220. Some courts have indeed held to the contrary. *Neis v. Farquharson,* 9 Wash. 508, and cases cited in opinion; *McMullen v. Ritchie,* 64 Fed. 253; *Keran v. Trice's Ex'rs,* 75 Va. 690.

The ground on which these last named decisions rest is substantially this: At common law if a witness, after being examined or having his deposition taken, become interested in the action, his testimony is not rejected on that account, because he was competent at the time the testimony was given, and his subsequent acquisition of an interest could not affect the credibility of testimony given before that event. *Cam-*

eron v. Cameron, 15 Wis. 1. This being the undoubted law, it is said that upon similar grounds it should be held that, if a witness was competent to testify to transactions with the opposite party when the deposition was taken, the subsequent death of the party should not prevent the deposition from being read as to those transactions. It seems very certain to us that this argument loses sight of the radical difference in the situation of the two cases. In the first case the common-law rule rejecting the testimony of an interested witness was founded simply on the fact that by reason of the existence of such interest it was considered that his testimony probably would be seriously affected thereby, and hence it was perfectly logical to hold that, if the interest did not exist when the testimony was given, the disqualification should not be held to exist at all. But in cases occurring under sec. 4069, Stats. (1898), the reason for excluding the testimony of one party as to transactions with a deceased opposing party is simply that, because the mouth of one party is closed by death, it is only fair that the mouth of the other should be closed by the law. This reason exists to its full extent as well when a deposition has been taken before the death took place as when no deposition has been taken, unless indeed the depositions of both parties have been taken under a stipulation that they may be read upon the trial, in which case it may well be that both would be admissible. *MacDonald v. Woodbury,* 30 Hun, 35.

The statute authorizes objections to be taken upon the trial in case of evidence taken by deposition to the same extent as if the witness were personally present (sec. 4092, Stats. 1898), and we conclude that the objections taken on the trial to the testimony of Coller concerning transactions and communications had by him personally with Mr. Gore in his lifetime should have been sustained.

With this testimony out of the case there is nothing to support the conclusion that Coller's failure to haul out the ma-

nure during the winter was excused, and, there being no dispute as to the expense of hauling it out, the amount of that expense should have been allowed on the counterclaim, making a total of $69.40 which should have been allowed thereon.

There is no claim that any eviction is shown except by the evidence of Coller as to conversations with Gore which we hold to be inadmissible, and if there was no eviction there is no justification for a recovery on account of the fall plowing done by Coller, for it was his duty under his contract to do such plowing. As matter of fact, however, the objectionable testimony shows no eviction. It simply shows that Gore in the spring of 1908 objected to Coller's staying on the place because he (Coller) had got into debt, and told him he (Gore) thought he (Coller) had better leave because he could not carry on the place, and Coller said, "All right; if you think I cannot, that is enough." In substance this is the entire basis for a claim of eviction, and Mr. Coller closes his testimony on the subject with this question and answer: "*Q.* You moved off the place simply because Gore told you he didn't want you to stay there any longer? *A.* Yes sir, I did." This does not show an eviction, but, taken in connection with the acceptance and resumption of possession by the landlord, it does show a voluntary surrender. It is unnecessary to decide whether it would have amounted to an eviction had there been an absolute demand of possession by the landlord and a vacating of the premises by the tenant in response thereto, for the testimony does not present that situation.

It is quite well settled that where there is a voluntary surrender, accepted by the landlord, all liabilities under the lease which would arise in the future had no surrender taken place are terminated, but liabilities which have already accrued remain unaffected. 2 Tiffany, Landl. & T. 1348, 1349. Under no view of the case, therefore, can the plaintiffs recover for the plowing done in the fall of 1907, for Coller's contract required him to do it, and his voluntary surrender of

possession raises no obligation on the part of the landlord to pay for it. The result is that the plaintiffs' claim is reduced to $51 and the defendant's counterclaim must be allowed at $69.40.

Inasmuch as the action is brought by assignees of Coller, the counterclaim can only be allowed so far as it offsets the plaintiffs' claim, as the assignees, of course, are not personally liable.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment dismissing the complaint.

GROTH, Respondent, vs. MILWAUKEE NORTHERN RAILWAY COMPANY, Appellant.

October 7—October 25, 1910.

Railroads: Condemnation of land: Payment of award into court: Withdrawal by landowner: Right to appeal: Waiver of objection: Laches: Estoppel: Discretion.

1. Whether if the amount awarded to a landowner in proceedings to condemn his land for railroad purposes is paid into court pursuant to sec. 1850, Stats. (1898), and is withdrawn by the landowner within the time limited for appealing and before the railroad company has taken possession of the land, and the company subsequently takes possession and does not appeal, such withdrawal bars the right of the landowner afterwards to prosecute an appeal from the award, not determined.
2. Where after such a withdrawal of the money by the landowner he appealed from the award, and no suggestion that he had lost his right to appeal was made until upon a second trial, after the appeal had been pending for a long time and the appellant had incurred much expense upon the faith of such remedy being open to him, and the railroad company then asked leave to plead the withdrawal as a supplementary defense, the company was estopped by its delay from insisting on such defense, or at least the court might properly, in its discretion, refuse to permit the defense to be so brought in.

Appeal from a judgment of the circuit court for Ozaukee county: Martin L. Lueck, Circuit Judge. *Affirmed.*

May 25, 1906, the defendant corporation duly commenced proceedings under ch. 87, Stats. (1898), to acquire title to real estate owned by plaintiff and others. Such occurrences duly took place thereafter that October 20, 1906, the report of the commissioners was filed, awarding plaintiff $1,300. The corporation thereupon deposited the amount of the award in court for plaintiff's use and he promptly withdrew the same, the defendant not having yet taken possession of the land. After such withdrawal he appealed from the decision of the commissioners. Defendant did not appeal. It took possession of the property and has ever since been in the enjoyment thereof. The case was not brought to a final trial on the appeal till March, 1910, there having been in the meantime many terms of court in the county where the appeal was pending. There was a trial in September, 1908, resulting in a verdict in plaintiff's favor for $2,100. No claim was made upon such trial that plaintiff had lost his appeal remedy by reason of having withdrawn the money as before indicated. The verdict was set aside and a new trial granted. Such new trial took place March 2, 1910. In the midst of the second trial for the first time, defendant claimed that plaintiff waived his appeal remedy and effectually settled the controversy by withdrawing the money, and moved the court without presenting any affidavit of merits, or any affidavit excusing the long neglect to insist upon the alleged defense, for leave to plead the withdrawal in bar of plaintiff's claim. The second trial resulted in a verdict in plaintiff's favor for $2,300. Judgment was, in due form, entered thereon.

For the appellant there was a brief by *Winkler, Flanders, Bottum & Fawsett,* and oral argument by *C. E. Monroe.* They contended, *inter alia,* that where the amount of a claim is in dispute the payment by one party and the acceptance by the other of a sum of money offered in settlement constitute

an accord and satisfaction and furnish a complete defense to an action upon the claim. *Kercheval v. Doty*, 31 Wis. 476; *Harris v. Kennedy*, 48 Wis. 500; *Zimmer v. Becker*, 66 Wis. 527; *Galusha v. Sherman*, 105 Wis. 263, 268. This principle has been expressly declared applicable to cases where an appeal has been taken from an award of a board or judgment of a court, and, either pending the appeal or prior to taking it, the appellant has accepted payment of the amount of the award or judgment or otherwise taken the benefit of its conditions. *Pulling v. Columbia Co.* 3 Wis. 337 (payment after appeal); *Cogswell v. Colley*, 22 Wis. 399 (payment before appeal); *Webster-Glover L. & Mfg. Co. v. St. Croix Co.* 71 Wis. 317, 319 (before appeal); *Price v. Grzyll*, 133 Wis. 623 (before appeal). The payment or settlement of a claim in litigation extinguishes the right of action and deprives the trial court of jurisdiction to proceed any further in the case, or to make any other order than one dismissing the action. Any other order or judgment will be reversed on appeal. *Geiser T. M. Co. v. Smith*, 36 Wis. 295, 297; *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210, 213, 217, 221; *Williams v. Williams*, 117 Wis. 125; *Dr. Shoop F. M. Co. v. Schowalter*, 120 Wis. 663, 667; *Hayes Co. v. Wileman*, 82 Neb. 669, 118 N. W. 478, 480; *Henk v. Baumann*, 100 Wis. 28; *Plano Mfg. Co. v. Rasey*, 69 Wis. 246, 251. The payment or settlement of a claim after judgment is a waiver of the right of appeal, and such appeal will be dismissed by the court whenever the facts are brought to its notice. In such a case the court will dismiss the appeal of its own motion, even against the protest of both parties. *Cogswell v. Colley*, 22 Wis. 399; *Webster-Glover L. & Mfg. Co. v. St. Croix Co.* 71 Wis. 317; *Hogan v. La Crosse*, 104 Wis. 106; *Lamoreux v. Williams*, 125 Wis. 543; *Price v. Grzyll*, 133 Wis. 623, 627; *Little v. Bowers*, 134 U. S. 547, 558; *California v. S. P. & T. R. Co.* 149 U. S. 308; *Mills v. Green*, 159 U. S. 651.

For the respondent there was a brief by *Henry J. Killilea*

and *William F. Schanen*, and oral argument by *Mr. Killilea*. They argued, among other things, that the filing of the award and payment of the money vested the title and exclusive use of the premises in the appellant, subject to the amount of the award being increased. *Jeffery v. C. & M. E. R. Co.* 138 Wis. 1; *West v. M., L. S. & W. R. Co.* 56 Wis. 318, 323; *Uniacke v. C., M. & St. P. R. Co.* 67 Wis. 108, 112; *Neilson v. C. & N. W. R. Co.* 91 Wis. 557, 559. The railway company having paid the money is in possession, and has no further interest in the money paid into court, the same being at the absolute disposal of the plaintiff unless the railway company appeals, which it did not in the case at bar. *Weyer v. M. & L. W. R. Co.* 57 Wis. 329; *Stolze v. M. & L. W. R. Co.* 113 Wis. 44. The defendant having no further interest in the disposition of the fund after paying it to the plaintiff or depositing it in court, the retention of it by the plaintiff, or withdrawing the same from court, can in no way affect his right to appeal. *Grand Rapids v. Bogoger*, 141 Wis. 530.

Marshall, J. The first question presented is this: If the amount of money awarded a landowner in condemnation proceedings under sec. 1850, Stats. (1898), be paid into court within the time limited for appealing, and the railroad company does not appeal, but the landowner does, yet withdraws the money before so doing and before the company takes possession, though such possession is subsequently taken, is such landowner precluded from pursuing the appeal remedy, if the railroad company sees fit to stand upon its rights in that regard?

Under the express provisions of the section referred to, the railroad company may pay the amount of the award to the landowner or into court for his use. In case of the latter, the company being in possession of the land and the landowner appealing, he may withdraw the money without prejudice to his appeal, but cannot do so pending an appeal by the cor-

poration, except upon filing a bond to repay the amount by which the award shall be abated on such appeal with costs.

Thus it will be seen the spirit of the statute is that upon an award of commissioners being made the landowner is entitled, absolutely, to the benefit of it, conditioned only that, in case of the money being paid into court and the corporation being in possession and contesting on its appeal the amount of the award, he cannot have the money except upon giving the bond mentioned. The idea is that, if the corporation waives its right of appeal, pays the money into court, and takes possession of the land, the landowner has, unconditionally, the right to such money and to the remedy to increase the amount as well. However, the statute does not, expressly, at least, afford the landowner the privilege of taking the money paid into court for his benefit while yet the corporation has not elected to go into enjoyment of the premises, and still retain his appeal remedy. Whether by implication such is the case from the fact that the whole plan of the statute is to vest the right of compensation in the landowner to at least the amount of the award, upon one being made, subject to the appeal remedy in favor of the corporation, and whether the taking possession by the corporation after withdrawal of the money and not appealing waives any irregularity in withdrawing the money, as in this case, prior to the landowner appealing and prior to such possession being taken, if there be such irregularity as regards its affecting the appeal remedy, are interesting propositions, the solution of one or both of which would be necessary to decide the first question. As we view the case, it is not necessary to the disposition of the appeal to decide either, since the second question presented is decisive. Therefore, it is considered best to leave such first question undecided.

The second question referred to is this: If a landowner withdraws money paid into court for his benefit, pursuant to an award in condemnation proceedings under sec. 1850, Stats. (1898), and subsequently appeals, the corporation not having

appealed or taken possession of the land, but taking such possession thereafter, and such withdrawal would under any circumstances constitute a bar to the appeal, and it is not suggested as such in the particular proceeding till upon a second trial, after the appeal has been pending for a considerable length of time, and appellant incurred much expense upon the faith of such remedy being open to him, and it is then brought to the notice of the court during the trial by application for leave to plead, as a supplemental defense, the fact and circumstances of the withdrawal—does the delay on the part of the corporation estop it from insisting upon such defense, or at best justify the court, in the exercise of sound judicial discretion, in refusing to permit it to be brought in by amendment or supplemental answer?

The foregoing statement of the vital proposition here is easily answered. So easily that no discussion or reference to authority is necessary. Upon the plainest principles of *estoppel in pais,* and loss of opportunity by laches, and competency of the court in judicial administration to exercise its judgment when to permit or deny an application to bring in new causes of action or defenses after the period for pleading as matter of right, the decision complained of seems to be well grounded and must be affirmed.

By the Court.—So ordered.

Decker, by guardian *ad litem,* Respondent, vs. Becker, Appellant.

October 7—October 25, 1910.

Champerty: Question for court or for jury?

When it is suggested during the trial that an action is being prosecuted under a champertous agreement, the question is properly one for the court to determine and not one for the jury.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an action for damages for the utterance of words slanderous *per se.* The jury returned a special verdict finding that the words had been spoken, and assessing the damages.

During the course of the trial the guardian *ad litem* for the plaintiff testified that he had arranged with the plaintiff's attorney that, unless the case was won, his ward should not be required to pay any costs. He also testified that he had that day paid the plaintiff's attorney money to subpœna a witness, and that he had previously paid him some money to pay costs in the case. The plaintiff's attorney testified that there were no arrangements with the parties plaintiff to this action with reference to the payment of costs in the action, "except that the guardian *ad litem* in fact, in case we won the suit, *Mr. Becker* would have to pay the costs; if we would lose, Mr. Decker would have to pay his own costs, the plaintiff would."

The court refused to submit the following questions requested by defendant's counsel for the special verdict:

"(5) Is the above entitled action maintained and prosecuted under a champertous agreement?

"(6) Is the above entitled action tainted with champerty?

"(7) Did the attorney for the plaintiff agree to pay any part of the costs of prosecuting the above entitled action?"

This is an appeal from the judgment in plaintiff's favor on the ground that the court erred in refusing to submit the above questions to the jury.

For the appellant there was a brief by *Wm. F. Schanen,* attorney, and *James D. Shaw,* of counsel, and oral argument by *Mr. Schanen.*

For the respondent there was a brief by *Chas. J. Kunny* and *J. E. Uselding,* and oral argument by *Mr. Kunny.* They cited, among other cases, *Orcutt v. Pettit,* 4 Denio, 233, 17

N. Y. C. L. 558; *Gescheidt v. Quirk,* 66 How. Pr. 272, 5 Civ. Proc. 38.

Siebecker, J. The only ground for reversal of the judgment pressed in this court is that the court erred in refusing to have the jury determine whether or not the evidence established that the action was being prosecuted by the plaintiff's attorney under a champertous agreement. It is urged that the defendant was of right entitled to have this question determined by the jury, for the reason that if they found that such a champertous agreement existed, then it established a defense for the abatement of the action. Whether such an issue, if the fact were alleged in the answer, issue taken thereon, and evidence offered to support it, is to be determined by a jury, need not be considered because this is not the state of the case. It was said in *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421, 84 N. W. 159, that:

"Champerty need not be pleaded and an issue need not be formed in regard thereto in order that it may be established and taken advantage of in the suit. It cannot be waived by any party to the litigation, nor stipulated out of the case. The taint of champerty does not affect the merits of a case at all, but affects the right of the champertor to use the court, regardless of the mere merits of his claim."

It is established that when a trial court is informed of the fact that the action pending before it is so tainted, it is its duty to refuse to proceed therein and to dismiss the action. *Kelly v. Kelly,* 86 Wis. 170, 56 N. W. 637; *Miles v. Mut. R. F. L. Asso., supra,* and cases there cited.

We are persuaded that the court committed no error in holding that the question of champerty, which was first suggested while evidence was being received upon the trial, was properly a subject for determination by the court and not one for the jury.

By the Court.—Judgment affirmed.

NICOLL, Respondent, vs. MODERN STEEL STRUCTURAL COMPANY, Appellant.

October 7—October 25, 1910.

Sales: Acceptance in part: Notice: Recoupment.

Upon receipt, at Waukesha in this state, of a carload of mixed iron, sent from Chicago upon a "rush order" and needed for immediate use in its foundry, the vendee, a steel structural company, wrote to the vendor stating that the car was very unsatisfactory and that if they were not entirely out of material they would certainly return it. Two days later the vendee again wrote renewing the complaint and stating that the material sent was not as promised and that a liberal allowance should be made from the price. The car in fact contained about forty per cent. of foreign material, while only about five per cent. was allowable under the contract. *Held*, that under the circumstances the use by the vendee of such part of the material as conformed to the contract did not constitute acceptance of the whole; that the letters mentioned constituted seasonable and sufficient notice that the shipment was not received as a compliance with the contract; and hence that in an action for the contract price the vendee was entitled to recoupment.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Reversed.*

This action was brought to recover balance due on contract. The established facts appear from the findings, which are as follows:

1. That the plaintiff at all times hereinafter mentioned was a sole trader, operating as such under the name of B. Nicoll & Company, among other things doing a business as a scrap-iron broker, buying and selling scrap iron, with office in the city of Chicago, Illinois.

2. That the defendant at all times hereinafter mentioned was a corporation incorporated and existing under the laws of the state of Wisconsin, conducting a structural steel plant, and, in conjunction therewith, a foundry.

3. That about the 18th day of October, 1907, the plaintiff and the defendant corporation made a contract in writing for the sale and delivery by the plaintiff of a carload of mixed iron at thirteen dollars and fifty cents ($13.50) per ton net, f. o. b. Waukesha, Wisconsin; that, under the terms of that agreement, the plaintiff was to ship to the defendant "one carload of mixed iron as inspected by R. T. Rolfe at buyer's plant, consisting of bolts, nuts, cast iron, malleable, plow points, horse shoes, steel, and also a small percentage of foreign material;" and that indorsed across the face of this contract are the words, "Very great rush. Ship immediately;" said contract being plaintiff's Exhibit 1, and a copy whereof is hereto annexed and made a part hereof.

4. That in pursuance of said contract the plaintiff shipped to the defendant at Waukesha, Wisconsin, from Chicago, Illinois, a carload of scrap; that this car was delivered to the defendant at Waukesha, Wisconsin, on October 31, 1907; that on the 28th day of October, 1907, plaintiff mailed an invoice of said car to the defendant for 36,050 pounds of mixed iron at thirteen dollars and fifty cents ($13.50) per ton net, amounting to two hundred forty-three dollars and thirty-four cents ($243.34); that said carload of iron delivered to the defendant as aforesaid was purchased by the plaintiff to fill the order of the defendant from one Adolph Blonder, a scrap-iron dealer in Chicago, but of that fact defendant had no knowledge.

5. That on the 31st day of October, 1907, when the car arrived, the defendant opened said car, made an inspection of the same, and, from such inspection, learned that the quality of the contents of said car was far below the specifications required in the contract, in that said car contained a large amount of foreign material, which, after the car was entirely unloaded, was found to amount to about forty per cent. of the entire contents thereof.

6. That under the contract of sale a small percentage of foreign material, in the light of the evidence, would reasonably be about five per cent. of the entire contents.

7. That the defendant company, being entirely out of material of the kind ordered from the plaintiff and being absolutely in need of material of this kind for the operation of its

foundry, immediately proceeded to unload and use said car of scrap in its foundry at Waukesha, and, at the same time, sent to the plaintiff the following letter:

"Waukesha, Wis., Oct. 31, 1907.

"*B. Nicoll & Co., Chicago, Ill.*

"GENTLEMEN:

B. Nicoll & Co., Chicago.
Received Nov. 1, 1907.

"We received car No. 74548 billed us on your invoice No. 6635, containing mixed iron. We are very much disappointed at the grade of iron which you have sent us in this car, as it contains nothing but tin cans, wire nails, and dirt. This is one of the most unsatisfactory cars we ever received and is of little value as malleable scrap. If we were not entirely out, we should certainly return the car.

"What we need is iron with a mixture of plow points, stove plates, and other malleable scrap.

"You now have on order another car which you expect to ship in a day or so, and we want to caution you not to send as poor a lot as this last car.

"Please advise by return mail when we may expect the next car, as this lot will only last us a very short time.

"Yours truly,

MHD "MODERN STEEL STRUCTURAL CO.

"By Hopkins."

8. That on November 2d, 1907, one day after the receipt of defendant's letter of October 31st, the plaintiff wrote to the defendant the following letter:

"Chicago, November 2, 1907.

"*Modern Steel Structural Co., Waukesha, Wisconsin.*

"GENTLEMEN: Replying to your esteemed favor of the 31st ult., relative to carload of mixed iron, we very much regret that this material turned out so poorly, and are only sorry that you were not in a position to reject the same, as the party from whom we bought it understood fully what he was to ship. The very fact of our asking him to load the car at once convinced him that our customer was badly in need of same and took advantage of this by loading poor stuff. The next car will be inspected personally by the writer before it is loaded, and can assure you that you will get no tin cans, iron nails, or dirt in same. It is our desire to take care of our

customers, and the party who loaded this car will never sell us another pound.

"Thanking you for past courtesies, we remain, respectfully,

"B. Nicoll & Company,

RTR MEA "R. T. Rolfe."

M. S. S. Co.
Received Nov. 4, 1907.

9. That the quality and general character of the material contained in said car was manifest upon inspection and was known to the defendant when it received and inspected the car on October 31, and the defendant's agents and employees complained immediately that said material was of inferior quality; that, nevertheless, defendant, without telephoning, telegraphing, or writing, except as is shown by the letters dated October 31 and November 2, 1907, to the plaintiff to the effect that it accepted the car under protest and would expect the plaintiff to make an allowance for the depreciation in value as compared with the selling price, went right on on October 31st and unloaded said car of material and proceeded to use it because it was entirely out of material of this kind and absolutely needed the same for the operation of its foundry.

10. That, under date of November 2, 1907, the defendant wrote the following letter to the plaintiff, which letter evidently crossed the letter written by the plaintiff to the defendant of the same date:

B. Nicoll & Co., Chicago.
Received Nov. 4, 1907.

"Waukesha, Wis. Nov. 2, 1907.

"*B. Nicoll & Co., Chicago, Ill.*

"Gentlemen: The writer has been away from home for several days, and upon his return home this morning found the car of mixed scrap you sent us was received yesterday morning; had he been at home at the time this car came in not a pound of it would have been unloaded. We think you have taken an extremely unfair advantage in our dealing with you for scrap iron. Aside from the first car of scrap iron which you sent us, you have not shipped anything which met

your agreement. The last car of mixed scrap contained a great deal of dirt, not iron, but simply sand and clay. You did have in it, however, about the mixture of kinds of material we wanted, and such as your representative saw when he was here. On the car now received, it is no more like the car you saw here than it is like No. 1 machinery scrap. This car consists of nails and old spikes, almost exclusively, we doubt if there is five pounds of cast iron in the car, and as a consequence, we have to mix high priced iron with it, in order to get it to run at all. It is as much of a disappointment to us as was the last car which purported to be No. 1 machinery cast; that car instead of being good scrap, as was promised, is nothing but the cheapest kind of cast scrap you can furnish, consisting of soil pipe, burnt-out furnace bottoms, and similar useless material.

"In reference to the car of machinery scrap, we now have on order with you, if this is not exactly what you promised in every particular, we shall refuse to accept it, and in relation to the last car of mixed scrap, we want you to make us a very liberal allowance from the price charged to cover the kind of material which you have sent.

"Yours truly,

WCL "MODERN STEEL STRUCTURAL CO.

"By W. C. Lloyd,

"Mgr. Crane Dept."

11. That on the 21st day of February, 1908, the defendant paid the plaintiff one hundred forty-eight dollars and seventy-six cents ($148.76) for the contents of said car and on account thereof.

12. That the amount so paid, to wit, one hundred forty-eight dollars and seventy-six cents ($148.76), was all that the material in the car was worth and was the reasonable value of said car of scrap iron.

Conclusions of law:

1. That, under the circumstances of this case, November 2, 1907, was an unreasonable time in which to notify plaintiff of the defects in the car and was not a timely notice to the plaintiff so that he might have an opportunity to inspect said car and protect himself.

2. That the plaintiff is entitled to judgment against the de-

fendant for the sum of ninety-four dollars and fifty-eight cents ($94.58), with interest from October 31, 1907, and costs.

Judgment was entered for the plaintiff in accordance with the findings, from which this appeal was taken.

For the appellant there was a brief by *Ryan, Merton, Newbury & Jacobson,* and oral argument by *T. E. Ryan* and *M. A. Jacobson.*

For the respondent there was a brief by *Carroll & Carroll,* and oral argument by *Geo. Carroll.*

Kerwin, J. The plaintiff contracted with the defendant for a carload of mixed iron consisting of the kind described in the contract "and also a small percentage of foreign material." The court found that there was forty per cent. of foreign material, and that under the contract a small percentage of foreign material would be about five per cent. of the entire contents, but further held that the defendant had accepted the carload and was not entitled to any deduction from the contract price. The question presented is whether the defendant, by accepting the shipment, waived its right to any deduction because of the foreign material. It is without dispute that there was about forty per cent. of the carload foreign material, and that only about five per cent. was allowable under the contract, and that the defendant had paid all the carload was reasonably worth. The question, therefore, arises whether notice was seasonably given and was sufficient to justify recoupment from the purchase price because of the forty per cent. of foreign material included and not covered by the contract. It is quite clear that the defendant did not rescind the contract *in toto,* but accepted such part of the material as complied with the contract. The order was a "rush" order. The iron was necessary for immediate use, to the knowledge of plaintiff. It would be a harsh rule that would require the defendant under the circumstances to pay for for-

eign material included in the shipment and not covered by the contract, merely because under pressing necessity it had used the portion of the material covered by the contract. It seems, under the circumstances of the case, that the notice was sufficient to protect the defendant against claim for the foreign material. The letter of October 31st contained complaint about the shipment, and, while it was doubtless sufficient to amount to an acceptance of the iron specified in the contract, it did not amount to an acceptance of the foreign material when read with the letter of November 2d. The letter of November 2d, we think, was seasonably sent under the circumstances, and sufficient to show that the shipment was not received as a compliance with the contract. Hence, in an action on the contract to recover, the court would be justified in making the proper deduction. *Locke v. Williamson,* 40 Wis. 377; *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785.

It follows from what has been said that the judgment of the court below must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to render judgment for the defendant.

ST. JOHN'S MILITARY ACADEMY, Respondent, vs. EDWARDS, County Treasurer, Appellant.

October 7—October 25, 1910.

Taxation: Exemptions: Statute construed: School property: "Association:" Corporations: Use of profits for educational purposes.

1. The term "association," as used in subd. 3, sec. 1038, Stats. (1898), may include a corporation organized under ch. 86.
2. Laws exempting property from taxation are to be construed strictly against the privilege claimed; but strict construction

does not mean that the court will not endeavor first to ascertain the true meaning of the words used. It comes into play only when, after such test, there remains ambiguity in the statute.

3. A school or academy is a scientific or literary association, within the purview of subd. 3, sec. 1038, Stats. (1898), and its property used for educational purposes is exempt from taxation.

4. The fact that a school charges for tuition and board and derives a profit therefrom does not render the property liable to taxation, when such profits are used in paying debts incurred for building and other school purposes.

5. The mere fact that such profits of a school corporation were used in 1900 and 1901 to pay dividends to stockholders did not render its property taxable in 1906 or thereafter.

[6. Whether the property was taxable for the years in which dividends were paid, or would become taxable should the profits again be used to pay dividends or to accumulate a surplus, not determined.]

Appeal from an order of the circuit court for Waukesha county: Martin L. Lueck, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a general demurrer to the complaint.

Milo Muckleston, district attorney, and *Henry Lockney,* of counsel, for the appellant, cited *Knight v. Stevens,* 66 App. Div. 267, 72 N. Y. Supp. 815, 818; *State v. Taylor,* 7 S. Dak. 533, 64 N. W. 548; *Allen v. Stevens,* 33 App. Div. 485, 54 N. Y. Supp. 8; *Detroit H. & D. School v. Detroit,* 76 Mich. 521, 43 N. W. 593; *Cincinnati College v. State,* 19 Ohio, 110; *Gerke v. Purcell,* 25 Ohio St. 229; *Montgomery v. Wyman,* 130 Ill. 17, 22 N. E. 845; *People ex rel. Pavey v. Ryan,* 138 Ill. 263, 27 N. E. 1095.

For the respondent the cause was submitted on the brief of *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel.

Timlin, J. From the complaint in this action it appears that the respondent was incorporated under the general incorporation law found in ch. 86, R. S. 1878 (ch. 86, Stats. 1898). These statutes authorize a stock corporation to be

formed in the manner there provided to conduct, promote, and maintain high schools, academies, and other like institutions. The articles of incorporation of respondent declare the business and purposes of said corporation to consist in establishing, maintaining, and conducting an academic institution. In addition it purports to be authorized "to buy, sell, hold, convey, and deal in real estate; to buy, sell, and deal in all kinds of personal property, and do and perform any act or thing and exercise any and all powers incident to the business and purposes above specified."

This incongruous combination of corporate powers is quite foreign to ancient legal conceptions. But sec. 1771, ch. 86, provides that a corporation may be formed "to conduct, pursue, promote or maintain any one or more of the following named purposes." Following this, the purposes specified in the respondent's articles are enumerated. Whether these corporate powers are properly joined in the articles is not before the court in this case except as it bears upon the questions of construction hereinafter considered. Plaintiff has not attempted to exercise all these powers. It is further averred that the plaintiff has been since its incorporation engaged solely in the business of conducting a school or academy for boys wherein instruction is given in literary and scientific studies, in a general way equivalent to the courses in the public high schools of this state; that it has during the past five years averaged more than 150 pupils in each year, with ten instructors. It owns less than ten acres of land in the town of Delafield in Waukesha county, which is used solely for the purposes of the plaintiff in its business of conducting this school or academy and has never been leased or otherwise used for pecuniary profit. It owns personal property of the value of about $4,500, which property is and at all times has been used by the plaintiff solely for the purpose of conducting a school or academy and no other purpose. It has debts incurred for enlarging and improving its schools. No divi-

dends have ever been declared or paid to its stockholders except in the years 1900 and 1901. It is not expressly averred that the respondent is charging tuition fees or making other charges to its pupils, but this may be inferred from the averments of the complaint that it paid a dividend in each of the years mentioned out of the profits accruing from the business of conducting such school or academy, and that there has been usually a surplus of receipts over expenditures each year, which surplus was applied in decreasing the debts of the respondent. The actual value of the real and personal property of the respondent is at least $36,000.

Respondent on this showing alleges that it is a scientific and literary association within the meaning of subd. 3, sec. 1038, Stats. (1898), and therefore its property is exempt from taxation. Notwithstanding this, the authorities of the town of Delafield in the year 1909 assessed the property of the plaintiff for the omitted taxes of the years 1906, 1907, 1908, and for the taxes of the then current year, 1909. This tax the respondent refused to pay. It was returned delinquent into the hands of the county treasurer defendant, who threatens to sell the real estate of the plaintiff for such unpaid real-estate taxes and to distrain its personal property to enforce the collection of the other taxes. An injunction is prayed for by the respondent, and the appellant in this court waives any objection he might have on the ground that there was an adequate remedy at law with reference to the personal property. The statute under which the plaintiff claims exemption from taxation is subd. 3, sec. 1038, Stats. (1898):

"Personal property owned by any religious, scientific, literary or benevolent association, used exclusively for the purposes of such association, and the real property, if not leased or not otherwise used for pecuniary profit, necessary for the location and convenience of the buildings of such association and embracing the same, not exceeding ten acres."

It is contended that the plaintiff is a corporation, not merely an association, hence not within the exemption.

Laws exempting property from taxation are construed strictly against the privilege claimed; but strict construction does not mean that we are not to search for and ascertain, if possible, the true meaning of the language used in the statute. It comes into play only when such language, after analysis and subjection to the ordinary rules of interpretation, presents ambiguity. This is an old statute. It appeared in R. S. 1849 as subd. 4, sec. 4, ch. 15, where the word "institution" is used instead of the word "association." Also R. S. 1858, ch. 18, sec. 4, subd. 4. By ch. 130, Laws of 1868, the word "association" was substituted for the word "institution." We adopted this original statute from Michigan, which in turn adopted it from Massachusetts, and it will be found in subd. 2, sec. 5, ch. 7, R. S. Mass. 1836, and in earlier statutes. "Association" is a generic term which may include a corporation. *Thomas v. Dakin*, 22 Wend. 9, 104; *U. S. v. Trinidad C. & C. Co.* 137 U. S. 160, 11 Sup. Ct. 57; *People ex rel. Parker Mills v. Comm'rs of Taxes*, 23 N. Y. 242. The statutes of this state relative to banking speak of a banking corporation as an association. Ch. 94, Stats. (1898). There is no apparent reason why a literary and scientific institution if merely associated should be exempted, but if incorporated it should be taxed. The reason for the exemption does not rest on the legal status of the persons operating or supporting the institution, but upon the fact that the institution is engaged in education. But it is not to be understood that the word "association" always includes a corporation. This will depend upon the context and the subject matter of the law as well as upon an historical view of the statute. Private and parochial schools have not been taxed in this state during the long existence of this statute, and they have no other ground of exemption unless it be in those special cases where the statute provides for the organization of certain religious corporations, such as secs. 1990, 1997, 2001—1, 2001—10, Stats. (1898). But these are more modern stat-

utes. The present facility of incorporation and the great number of corporations now existing has increased the necessity for distinguishing between corporations and mere associations, and there is a tendency to narrow the meaning of the word "association" in this respect so as to designate only voluntary unincorporated confederacies or combinations. But this is the conservatism of the law which the unthinking sometimes make matter of reproach, that the popular meaning of words is constantly changing, but the law, dealing with things or rights long established, must look back to the more ancient meaning in order that rights do not change with fashions in the use of words. The plaintiff is within this statute notwithstanding that it is an incorporated association.

It is next contended that there is exempted only the property owned by religious, scientific, literary, or benevolent associations, and that the plaintiff is neither. This presents the question whether a school is a scientific or literary association. It is an institution. But there must ordinarily be an association of patrons, professors, or pupils in order to constitute a school. The word "school," except when applied to a building or place, implies plurality and consociation. Upon this point we follow and approve the case of *Detroit H. & D. School v. Detroit,* 76 Mich. 521, 43 N. W. 593; *Indianapolis v. Sturdevant,* 24 Ind. 391; and *Ramsey Co. v. Stryker Seminary,* 52 Minn. 144, 53 N. W. 1133. This is the construction which the similar statute has received in Massachusetts. Pub. Stats. Mass. 1882, ch. 11, sec. 5, subd. 3; cases collected in 7 Mass. Dig. tit. Taxation, sec. 55. The personal property of the plaintiff is used exclusively for scientific and literary purposes, and the real estate is not leased nor otherwise used for pecuniary profit and does not exceed the amount specified in the statute. The dividends paid did not occur in either of the years in which taxes are laid. Payment of dividends, if it ren-

dered the association liable to taxation for these years, would not have the effect of making it forever afterward liable to taxation. Creating debts for the purpose of purchasing apparatus, building, or repairing, and afterward paying these debts from the proceeds of tuition, is using the property for the purposes of such association. *Mt. Hermon Boys' School v. Gill,* 145 Mass. 139, 13 N. E. 354. Whether this corporation was legally taxable for the years 1900 and 1901, or whether, in case it becomes in the future a money-making concern, distributing its profits to its stockholders in dividends or accumulating them in surplus, it would be taxable, is not decided. We do not adopt any precedent herein cited to that extent, but leave this question as a new question in this state to be met and decided when occasion requires.

By the Court.—Order affirmed.

BELL, Respondent, vs. TOWN OF LESSOR, Appellant.

October 8—October 25, 1910.

Highways: Defects: Injury to traveler: Proximate cause: Notice of defects: Pleading: Evidence: Special verdict: Form of question: Harmless error.

1. In an action against a town for personal injuries sustained on a highway, a complaint alleging that a large gully or hole had been formed in the traveled track next to the edge of a culvert and that about a rod beyond the culvert was another hole about two feet deep in the traveled track; that the front wheels of the carriage in which plaintiff was riding ran into the first hole and struck the edge of the culvert, breaking the carriage box and a clip bolt which fastened one side of the tongue to the axle; and that immediately thereafter one wheel ran into the other hole, the tongue fell, the wheel struck the horses, and plaintiff was thrown out and injured, is *held* to show that the defects in the highway caused the injury.

2. Contributory negligence on the part of the driver being negatived by the jury, testimony tending to show that the accident happened substantially as alleged warranted a finding that the insufficiency of the highway was the proximate cause of the injury.
3. Testimony of the town chairman that he was familiar with the place, having examined it about two days before the accident because he had been called upon to do so at that time, was sufficient to sustain a finding that the town had actual notice of the defects.
4. Error, if any, in submitting to the jury through inadvertence the question whether insufficiency of the highway was *a* proximate cause of plaintiff's injury, is not ground for reversal, where the full and accurate charge to the jury—telling them, among other things, that before they could answer the question in the affirmative they must find that the defects were *the* proximate cause of the injury—conclusively shows that they were not misled by the form of the question.

Appeal from a judgment of the circuit court for Oconto county: S. D. Hastings, Circuit Judge. *Affirmed.*

Action to recover damages for personal injuries sustained by reason of the insufficiency of a public highway in the defendant town. The jury found (1) that there was an insufficiency or want of repair of the highway at the time and place in question; (2) that such insufficiency or want of repair was a proximate cause of plaintiff's injuries; (3) that the officers of the town knew of such insufficiency or want of repair a sufficient length of time before the injury to have enabled them by the exercise of ordinary care to have repaired it; (4) that no want of ordinary care on the part of the driver with whom plaintiff was riding contributed proximately to produce her injury; and (5) assessed her damages at $560. From a judgment in favor of plaintiff entered upon the special verdict the defendant appeals.

P. J. Winter, for the appellant.

Orlando E. Clark, for the respondent.

Vinje, J. 1. It is claimed by the defendant that the complaint fails to state a cause of action because it does not charge

that the alleged defective condition of the road was the cause of the accident or had anything to do with it, and the case of *Bodah v. Deer Creek*, 99 Wis. 509, 75 N. W. 75, is relied upon to support the claim. The complaint alleges in effect that a large gully or hole had been formed in the traveled path of the highway next to the north edge thereof, which gully or hole had been cut by the action of the water and lack of proper drainage, and was several inches below the north edge of a culvert therein; also that about one rod south of said culvert there was another hole in the traveled part of said highway about two feet in depth so that persons traveling on said road were liable to run the vehicles into said gullies. It then alleges that on the day in question

"the plaintiff was traveling in said highway riding in a carriage drawn by two horses . . . and while traveling over the traveled track of said highway where said gullies or holes were, the front wheels of said carriage ran into the hole or gully at the north edge of said culvert and struck the edge of the culvert so that the shock broke the front of the carriage box and also broke one of the clip bolts that fastened one side of the tongue to the axle, and immediately thereafter the right front wheel of the carriage ran into the deep narrow hole or gully situated as aforesaid about a rod south of said culvert, the tongue fell and the wheel struck the horses, and plaintiff was thrown out of the carriage violently," and sustained the injuries complained of.

In the *Bodah Case* the description of the highway in the complaint was held to be the description of an ordinary turnpike road, constructed as they generally are through low and flat lands in country districts, and there was no allegation that any defective condition of the road caused the injury. Hence the complaint stated no cause of action. In the case at bar serious defects in the traveled part of the highway are alleged and described; and then facts are stated from which it clearly appears that such defects caused the injury. The complaint states a cause of action.

2. It is next claimed that there was no competent evidence

from which the jury could find that the defects in the highway were the proximate cause of the injury. The only testimony on the subject is that of the plaintiff and Dr. Lenfesty, with whom she was riding. The latter testified that when they struck the culvert, though not going at a rapid pace, they received such a jar that the dashboard of the buggy broke; that he saw a short distance ahead a hole or puddle in the traveled part of the road, which he tried to avoid, but one of the ponies stepped to the right of the hole, and the right front wheel of the buggy dropped into it to the hub. The ponies pulled it out, and when they were the length of the buggy beyond the hole the right-hand side of the tongue dropped—that is, from its fastening to the axle. The ponies then became unmanageable and the buggy was overturned and plaintiff injured. There is no evidence to contradict this testimony. The jury, having negatived the fact that the driver was guilty of any want of ordinary care that contributed to produce the injury, were certainly warranted in drawing the inference that plaintiff's injury was the legitimate sequence of the thing amiss, namely, the defects in the highway. When, in addition thereto, damage is established, as it was in this case, that is all that is necessary. Cooley, Torts (2d ed.) 73.

3. Error is assigned on the ground that there was no evidence in the case to sustain the finding that the town had actual notice of the defects. The chairman of the town testified that he was familiar with the highway at the place where these defects were alleged to exist; that two days before the accident he had traveled over it and had then paid particular attention to the condition of the culvert and to the hole or gully in the road south thereof. He described the rut or gully as he found it, and gave as his reason for being able to testify so minutely about it that he was called upon to examine the road at that time. This is sufficient evidence to sustain the finding.

4. The third question submitted to the jury was as fol-

lows: "Was said insufficiency or want of repair a proximate cause of the plaintiff's injury?" It is claimed that this question was misleading and highly prejudicial to defendant and very likely to mislead the jury, because there is a vast difference between *a* proximate cause and *the* proximate cause, and an injury may be the result of more than one proximate cause; that in this case the jury were asked to find only whether or not the insufficiency in the highway was one of several proximate causes, not whether it was *the* proximate cause. It will not become necessary to pass upon the objections raised to the form of the question, which was undoubtedly the result of mere inadvertence, for the charge of the court to the jury shows conclusively that they were not misled. They were told that they must find the defects in the highway to be *the* proximate cause of the injury before they could answer the question in the affirmative. The phrase "*the* proximate cause" was used three times in the charge, and the phrase "*a* proximate cause" was not used at all. The instructions on the subject were full and accurate, and we are satisfied that no prejudicial error resulted from the form of the question. We find no error in the record.

By the Court.—Judgment affirmed.

PARB, Plaintiff in error, vs. THE STATE, Defendant in error.

October 8—October 25, 1910.

Criminal law: Burning insured property: Pleading: Unlicensed insurance company: Cross-examination of accused: Discretion: Jury: Unauthorized view: Harmless error.

1. An information under sec. 4405, Stats. (1898), charging the wilful burning of insured property with intent to defraud the insurer, need not allege that the insurer was authorized to do business in this state. The gravamen of the offense being the

wilful burning with intent to recover the insurance, the accused may be convicted notwithstanding invalidity of the policy, if he believed it to be valid.

2. It was not an abuse of discretion in this case, upon cross-examination of the accused, to compel him to answer various questions as to his past history in order that the jury might judge of his credibility.

3. While it was misconduct on the part of jurors to visit the damaged building during the trial without a view having been authorized, such misconduct does not require a reversal of the judgment under sec. 3072*m* (Laws of 1909, ch. 192), no substantial rights of the accused appearing to have been affected thereby.

Error to review a judgment of the circuit court for Sheboygan county: Michael Kirwan, Circuit Judge. *Affirmed.*

The cause was submitted for the plaintiff in error on the brief of *F. Vollrath,* and for the defendant in error upon that of the *Attorney General* and *Edward Voigt,* district attorney.

Winslow, C. J. *Parb* was convicted under sec. 4405, Stats. (1898), of wilfully burning insured property, consisting of merchandise, with intent to injure the insurers, and he brings his writ of error to reverse the judgment.

It is not deemed necessary to make any detailed statement of the facts. The following propositions are decided:

1. The evidence, though all circumstantial in its character, was sufficient to justify the jury in returning a verdict of guilty.

2. It was not necessary to allege in the information that the insurance companies attempted to be injured were authorized to do business in this state under sec. 1915, Stats. (1898), although it appeared on the trial that such companies were organized under the laws of another state. The gravamen of the offense is the wilful burning of property with the intent to realize the insurance thereon, and this is accomplished just as completely whether the policy be valid or invalid, pro-

vided the insured believed it to be valid, as quite conclusively appears in this case. *McDonald v. People,* 47 Ill. 533; *State v. Tucker,* 84 Mo. 23.

3. The plaintiff in error was a witness in his own behalf, and upon his cross-examination he was required to answer against objection many questions relating to his past history—where he had lived, what had been his occupation, and what had been the circumstances under which he had lived. We do not deem it necessary to state the evidence so received. The fact appeared that he had traveled under different names, and we think the court did not abuse its discretion in allowing a considerable latitude to the state in this direction. In order to judge of his credibility the jury was entitled to know the previous manner of life of this accused person who had made himself a witness. *State v. Nergaard,* 124 Wis. 414, 102 N. W. 899.

4. It appears that during the trial several of the jurymen went to the building where the fire occurred, which it seems was not destroyed but only damaged, and made some examination of it. This was misconduct on the part of such jurors. *Peppercorn v. Black River Falls,* 89 Wis. 38, 61 N. W. 79. Such misconduct should not result in reversal of the judgment, however, unless in the opinion of the court it appears that it has affected the substantial rights of the plaintiff in error. Sec. 3072*m,* Stats. (Laws of 1909, ch. 192). After an examination of the entire record we cannot say that it so appears. The trial judge examined into the matter very carefully and took the testimony of all the jurors and became convinced that such examination of the building had not in any way affected the verdict or prejudiced the plaintiff in error, and we are unable to say that his conclusion was not correct.

By the Court.—Judgment affirmed.

McARTHUR, Respondent, vs. MOFFET and others, Appellants.

October 4—November 15, 1910.

Pleading: Joinder of causes of action: Statute construed: "Cause of action:" "Transaction:" "Subject of action."

1. The dominant idea in subd. 1, sec. 2647, Stats. (1898), is to permit joinder of causes of action legal or equitable if there is some substantial point of unity between them.
2. As used in said subdivision the terms "cause of action," "transaction," and "subject of action" mean different things.
3. The term "cause of action" as there used includes the facts showing plaintiff's right and its violation by the defendant.
4. The term "transaction" means whatever may be done by one person which affects another's rights and out of which a cause of action may arise.
5. Cases in this court as to what constitutes "subject of action" cannot be harmonized, and the court does not now attempt to lay down any hard-and-fast definition which shall be applicable to all cases which may arise.
6. The definition given in *Telulah P. Co. v. Patten P. Co.* 132 Wis. 425, 430, and approved in *Brahm v. M. C. Gehl Co.* 132 Wis. 674, 679, of the term "subject of the action" in sec. 2656, Stats. (1898), as being composed of the plaintiff's right and the defendant's invasion thereof, is withdrawn.
7. The term "subject of action" must be deemed to mean the same thing wherever it is used in the Code.
8. The clause in subd. 1, sec. 2647, Stats. (1898), in which the term "subject of action" is used will find its most frequent application in equitable actions, but is not to be limited to them.
9. In possessory or proprietary actions, whether involving real or personal property, the "subject of action" is composed of the plaintiff's primary right together with the specific property itself. A statutory cause of action to quiet title to land and a cause of action for trespass on the same land arise, therefore, out of "transactions connected with the same subject of action," and may be joined.
10. *It seems* that in all other actions the plaintiff's right which is alleged to have been invaded must be held to be an essential part, and perhaps in many cases the whole, of the "subject of the action," as those words are used in the Code.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The cause was submitted for the appellants on the brief of *C. R. Fridley,* and for the respondent on that of *Grace & Hudnall.*

WINSLOW, C. J. The complaint contains two counts. The first states a statutory cause of action under sec. 3186, Stats. (1898), to quiet plaintiff's title to a number of tracts of unoccupied land to which the defendants "make some claim." The second states a cause of action at law to recover damages for trespass and the cutting of timber on said lands prior to the commencement of the action. A demurrer to this complaint for improper joinder of causes of action was overruled, and the defendants appeal.

The exact question presented is whether a statutory cause of action to quiet title to land and a cause of action for trespass on the same land "arise out of the same transaction or transactions connected with the same subject of action," within the meaning of subd. 1, sec. 2647, Stats. (1898). These words are found in the first subdivision of that section of our Code which authorizes the joinder of different causes of action in the same complaint. They were first introduced into the New York Code by amendment in 1852. They were incorporated into our original Code in 1856, and have remained there unchanged since that date. They are also to be found substantially unchanged in the Codes of nearly if not quite all of the Code states. It would seem that at this late date there ought to be little doubt as to their true scope and meaning. Courts and text-writers have been busy for more than half a century drafting and redrafting definitions of the words "transaction" and "subject of action" as new cases have presented themselves, but on the whole it may well be doubted whether the discussions have resulted in clarity of

thought. The words are general to the last degree. Indeed they must be so, for they are intended to provide for and apply to the myriad difficulties that may arise between man and man in all kinds of situations, and no words of limited or narrow meaning could be used. The difficulty lies not merely in the unfortunate paucity and poverty of human language, but in the equally unfortunate incapacity of the human mind to appreciate in advance and provide for future difficulties arising out of new situations and complications.

In view of what has been said, it may seem somewhat presumptuous for us to enter upon a new discussion of the subject or to attempt to make new definitions and thus perhaps only make confusion worse confounded. We would never willingly "darken counsel by words without knowledge," and we hope not to do so now; but we feel that the case demands a careful re-examination of the meaning of the words in question in the light of all that the various courts and text-writers have said about them. It may be that we shall add nothing useful to the discussion, yet it seems as though every treatment of the subject by an intelligent mind, viewing it from a new standpoint and as applied to new circumstances and aided by the experience and suggestions of previous investigators, should be helpful.

Sec. 143 of the original New York Code of 1848 (ch. 379, Laws of N. Y. 1848) provided for the joinder of several causes of action in the same complaint, but it contained no provision of this kind. It simply provided that "the plaintiff may unite several causes of action in the same complaint, where they all arise out of "(1) Contract, express or implied," and then followed six subdivisions or classes of actions, the section closing with this provision: "But the causes of action, so united, must all belong to one only of these classes, and must equally affect all the parties to the action, and not require different places of trial." It will be noticed that the

section contains no provision expressly allowing the joinder of legal and equitable causes of action, nor does it contain the provision now under consideration, namely, the provision allowing joinder where the different causes "arise out of the same transaction or transactions connected with the same subject of action."

The cold, not to say inhuman, treatment which the infant Code received from the New York judges is matter of history. They had been bred under the common-law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to import into the Code rules and distinctions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators.

Although the Code by its terms abolished all existing forms of pleading and prescribed one general form of pleading which should be used in all actions, the courts early decided that the distinctive features of pleadings at law and in equity still remained, and so they easily held that what was formerly called a cause of action at law could not be joined with what was formerly called a cause of action in equity.

To meet and counteract this narrow and illiberal construction of the law the amendments of 1852 were adopted, providing expressly that legal and equitable causes of action might be joined, provided they both belonged to one of the seven classes, and further creating a new class of joinable actions, to wit, those which arise out of the "same transaction or transactions connected with the same subject of action." It is very clear that the legislative intent in making these amendments was to permit and encourage the joinder of causes of action which could reasonably be said to involve kindred rights and wrongs, and thus settle such kindred rights

and wrongs in one proceeding, rather than to require them to be settled by piecemeal in different actions with much greater expenditure of time and money.

Some other conclusions seem equally clear concerning these amendments. They were all intended to accomplish some definite purpose, some change in the existing condition of things. They were not inserted to fill up space or for rhetorical effect. The word "transaction" was intended to define one thing and the words "same subject of action" another and different thing, and both were intended to define a different thing from the words "cause of action." To hold that any two of these three terms mean the same thing is to make nonsense of the whole phrase.

Again, it is very apparent that the dominant idea was to permit joinder of causes of action legal or equitable in case there was some substantial point of unity between them. It was contemplated evidently that this point of unity might be very near to the causes of action, *i. e.* that both causes of action might arise directly out of the same event or affair (called a "transaction" in the statute), in which case they were joinable; and it was also contemplated that the point of unity might be further off in the chain of events, *i. e.* that while the two causes of action had their immediate inception in different "transactions," still, if these different transactions were both connected with one fundamental matter or thing or combination of matters or things called the "subject of action," there was still a sufficient element of unity to justify their being joined in one action. Now it is manifest that the principal difficulty here consists in the meaning of the term "subject of action." The words "cause of action" and "transaction" present no very serious difficulties, but "subject of action," as before said, is a very general and comprehensive term which must be applied to very many and very diverse situations. It is relatively easy to give it a definition in terms equally general. For instance, one can say that it is

some fundamental matter or thing common in greater or less degree to each cause of action and without the prior existence of which the cause of action itself could have no existence; but this definition affords little help in applying the words to a concrete case. The definition is as general and vague as the words which it is supposed to define.

The difficulties surrounding the accurate definition of these words were at once appreciated by the courts of New York. Judge COMSTOCK, in 1858, said of the amendment of 1852:

"Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and yet so comprehensive any rules less liberal than those which have long prevailed in courts of equity." *N. Y. & N. H. R. Co. v. Schuyler,* 17 N. Y. 592.

In 1876 Chief Justice CHURCH said:

"This language is very general and very indefinite. I have examined the various authorities upon this clause, and I am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for courts to pass upon the question as each case is presented. To invent a rule for determining what the 'same transaction' means, and when a cause of action shall be deemed to 'arise out' of it, and what the 'same subject of action' means, and when transactions are to be deemed connected with it, has taxed the ingenuity of many learned judges, and I do not deem it necessary to make the effort to find a solution to these questions." *Wiles v. Suydam,* 64 N. Y. 173.

The well known allusion to that unfortunate class of people who rush in where "angels fear to tread" may occur to the irreverent mind at this point, but we feel compelled to proceed with our investigations nevertheless.

HUMOR?

As before indicated, it is entirely certain that the three expressions, "cause of action," "transaction," and "subject of

action," mean different things as used in this statute. To say that "subject of action" means the same thing as "transaction" is to say that the legislature chose to be wilfully obscure and misleading at a time and place where clarity was above all things necessary. To say that it means the same thing as "cause of action" would make the clause proclaim that causes of action may be joined if the same cause of action is common to both of them—a construction which involves a manifest absurdity. Our main concern here is with the meaning of the words "subject of action," because, if the two causes of action are joinable at all, it is because they arise out of transactions connected with the same subject of action, rather than because they arise out of the same transaction.

The intimate relationship between the three terms, "cause of action," "transaction," and "subject of action," in the sentence, however, and the evident necessity of the drawing of some fairly accurate distinction between them in order that the true significance of the latter term may be arrived at, renders it proper, if not absolutely necessary, to consider them all. As the meaning of the first two terms seems to be quite well settled, both in this state and in the Code states generally, it seems wise to take them up first in the discussion.

1. The term "cause of action" occurs several times in the original Wisconsin Code. Perhaps its appearance is most significant in subd. 2 of sec. 47 of that Code (ch. 120, Laws of 1856), now subd. 2 of sec. 2646, Stats. (1898), which provides that the complaint shall contain "a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition." This makes it very clear that in the minds of the makers of the Code the "cause of action" is made up of the facts necessary to be pleaded and proved in order to establish the defendant's liability to the plaintiff. These must be of two classes: (1) the facts which show the plaintiff's right; and (2) the facts which show the defendant's violation of that right.

Pomeroy says (Code Remedies, 4th ed. § 347):

"The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."

Substantially this definition is supported by the authorities generally. It is supported in this state in *Bruil v. Northwestern Mut. R. Asso.* 72 Wis. 430, 39 N. W. 29. Rapalje's definition is there quoted: "The fact, or combination of facts, which give rise to a right of action," and it is said: "A cause of action does not arise until the facts exist which constitute the cause of action, and not merely the one fact which may be the breach of duty." In *South Bend C. P. Co. v. George C. Cribb Co.* 105 Wis. 443, 81 N. W. 675, it is said: "In every cause of action there must exist a primary right, a corresponding primary duty, and a failure to perform that duty." In *Emerson v. Nash,* 124 Wis. 369 (102 N. W. 329), at page 387 it is said: "A cause of action consists of those facts as to two or more persons entitling at least some one of them to a judicial remedy of some sort against the other, or others, for the redress or prevention of a wrong. . . . There should be a right to be violated and a violation thereof."

There seems no logical escape from the conclusion that the term "cause of action" must include the facts showing (1) the plaintiff's right; (2) the defendant's corresponding duty; and (3) the defendant's breach of that duty, or, to put it more tersely, the plaintiff's right and its violation by the defendant.

2. The word "transaction" is defined in Pomeroy's Code Remedies (4th ed. § 367) as follows: "A negotiation, or a proceeding, or a conduct of business, between the parties, of such a nature that it produces, as necessary results, two or more different primary rights in favor of the plaintiff, and wrongs done by the defendant which are violations of such rights."

In *Craft R. M. Co. v. Quinnipiac B. Co.* 63 Conn. 551, 29 Atl. 76, it is defined as "something which has taken place whereby a cause of action has arisen. It must . . . consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered."

This court defines it in the *Emerson Case,* 124 Wis. 369 (102 N. W. 329), at page 389, as follows: "Any event in which two or more persons are actors, involving a right which may presently or by what may proximately occur in respect thereto be violated, creating a redressible wrong, is a transaction within the meaning of the statute." This seems practically to be the same as Pomeroy's definition.

In *Scarborough v. Smith,* 18 Kan. 399 (a very interesting and instructive case), it is defined thus: A transaction is "whatever may be done by one person which affects another's rights, and out of which a cause of action may arise."

At first glance both Pomeroy's definition and the definition given in the *Emerson Case* might seem to imply that both parties to the action must be active participants in the event or affair in order that it constitute a "transaction." If this were so, neither a trespass on land in the absence of the owner, nor an unfounded claim of title to land in like absence, would amount to a transaction, and it would necessarily follow that neither cause of action here stated arises out of a "transaction" within the meaning of the statute, and hence there could be no connection between either cause of action and the subject of the action.

The definitions referred to, however, do not, when properly understood, mean that both parties must actually be present in order that an event or affair may rise to the dignity of a transaction. If the act of one person wrongfully invades or infringes upon the right of another there is undoubtedly a "transaction," though the injured party be not

physically present. He may, in such case, truly be called a participant in the act, because he is represented by his right which is invaded or violated by his adversary's act. The definition in the Kansas case cited exactly fits this view. With this understanding of its meaning there seems no reason to doubt that the definition given by this court in the *Emerson Case* is substantially correct.

3. We pass now to the consideration of the phrase "subject of action," which presents much greater difficulty as well as greater confusion in the authorities. We start with a proposition which seems to us incontrovertible, namely, that the makers of the Code not only had some definite and certain idea in mind when they used these words, but that such idea was a different idea from the ideas embodied in the words "cause of action" or "transaction."

It is entirely true that in literature, logic, and grammar the word "subject" means that which is treated of, the theme of discourse, or that of which something is affirmed or predicated. Hence it could logically be said, if there were no other considerations to be kept in view, that the subject of an action is the defendant's invasion of the plaintiff's right, because this is the matter which is the paramount theme treated of. It by no means follows, however, that this definition can or ought to be applied here. The question is not necessarily, What do literary purists or lexicographers mean by the word? although this is helpful and should be considered, but, What did the legislature mean by it? It is not a word like "horse" or "cow," which can mean but one thing in whatever position it be placed, but it may be applied, and probably rightly applied, by different minds to different things, tangible or intangible, under the same circumstances. For example, in an action of ejectment one mind might arrive at the conclusion that the land alone was the subject of the action, another that its title was the subject, another that the defendant's wrongful possession was the subject, and still another that all these

things together constitute the subject. All of them are treated of in the action. Which or how many of them did the legislature intend to refer to when it spoke of the "subject of action?" This is the problem which it is necessary to solve in order to decide the present case.

In considering this question it is important, in the first place, to note that the term is used several times in the original as well as in the present Code in entirely different connections. Of course it must be assumed that wherever it is used in the same act it means the same thing, and it ought to be helpful to ascertain the meaning which seems ascribed to the term in its other connections, if any particular meaning be apparent.

In the original Wisconsin Code the term was used at least seven times, including the instance under discussion. The first instance seems to be in sec. 21 (ch. 120, Laws of 1856), now sec. 2602, Stats. (1898), which provides that "all persons having an interest in the *subject of the action* and in obtaining the relief demanded may be joined as plaintiffs." The inference here would seem to be that tangible property might, in some cases at least, be considered the subject of the action; but perhaps the inference is not very persuasive, and we pass to the next instance of the use of the term, which occurs in sec. 27 of the original Code, now appearing in slightly altered form as sec. 2619, Stats. (1898). This section provides that four classes of actions must (subject to the power of the court to change the venue) be tried in the county in which the *subject of the action* or some part thereof is situated. These classes of actions are (1) actions for the recovery of real property, or of any estate or interest therein, or for the determination in any form of such right or interest, or for injuries to real property; (2) actions for the partition of real property; (3) actions for the foreclosure of a mortgage of real property; and (4) actions for the recovery of personal property distrained for any cause. It will be noticed that these are all actions involv-

ing either the title or some interest in or lien upon specific real or personal property. Now, can there be any doubt from the language of the section and the careful grouping of these actions, which all involve specific tangible property, that the legislature meant to refer to that specific tangible property as the subject of the action and to require that the action be tried in the county where it is situated? Again, is there any doubt that the profession and the courts have so construed the section without question from 1856 up to the present time? We believe no case will be found in this state where it has been even suggested by court or counsel that this section means anything but that the actions named are local actions whose locality (subject to change of venue for sufficient cause) is fixed by the locality of the real or personal property involved, which real or personal property is called by the legislature the "subject of the action." *Young v. Lego,* 38 Wis. 206; *West v. Walker,* 77 Wis. 557, 46 N. W. 819.

But any lingering doubt as to the meaning of the term here must surely be removed when we consider subd. 3 and 4 of sec. 40 of the original Code, now found in expanded form in subd. 1, 3, and 7 of sec. 2639, Stats. (1898). This section provides for service of the summons by publication where personal service cannot be made. Such substituted service may be made under these subdivisions (1) where the defendant is a nonresident, but has property within the state, and the action is on contract, "and the court has jurisdiction of the *subject of the action,*" and (2) where "the *subject of the action* is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein." Here it is definitely stated that there are actions in which the subject of action is real or personal property. Here also, we think, there has been an universal consensus of opinion among lawyers and courts that the last mentioned clause was in-

tended to and did apply to all controversies involving the title of specific real or personal property situated within the state, and that in such cases there could be service by publication, because of the fact that such property was the subject of the action and was within the state.

In sec. 49 of the original Code, now sec. 2649, Stats. (1898), it is provided that the defendant may demur to the complaint when it appears upon the face thereof that the court has "no jurisdiction of . . . the subject of the action," and in sec. 55, Id., now sec. 2656, Stats. (1898), it is provided that the defendant may interpose by way of counterclaim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the *subject of the action;*" and, lastly, in sec. 73, Id., now sec. 2647, Stats. (1898), we find the provision for joinder of causes of action legal or equitable "where they arise out of the same transaction or transactions connected with the *same subject of action.*"

Some time and space has been spent in collating and considering these various instances of the use of the term "subject of action" in the original Code, not only to show that it must have been used by the Code makers deliberately and advisedly, but also because it seems that in many of the discussions of its meaning as used in the joinder and counterclaim sections there has been little or no attention paid to the help which might be derived from considering the obvious meaning attached to it when used in the other sections above referred to. Possibly some of the confusion in the authorities might have been avoided had all the provisions of the act in which the term is used been viewed together. That there is much confusion upon the subject, both in the decisions and in the text-books, cannot be denied, and there seems to be as much in Wisconsin as elsewhere. In *Scheunert v. Kaehler,* 23 Wis. 523, it was said, considering the counterclaim statute, that the subject of an action for conversion of money was the "tort or

wrong committed;" and in *Stolze v. Torrison,* 118 Wis. 315, 95 N. W. 114, it was said of an action of trespass upon real estate, that the subject of the action is not the land nor the title to the land, but the torts alleged. These two cases seem to indicate that, in actions for torts committed upon property, the tort and not the property is the subject of the action.

On the other hand, it is said in *Cornelius v. Kessel,* 58 Wis. 237, 16 N. W. 550 (still considering the counterclaim statute), that in ejectment "the subject of the action is the land in controversy;" and in *Kruczinski v. Neuendorf,* 99 Wis. 264, 74 N. W. 974, it is said that an equitable cause of action to remove a cloud fraudulently placed on the title of land and a legal cause of action to recover possession of the land, with rents and profits for its use, may be joined under the statute because "the subject of the action is the land." In *Leinenkugel v. Kehl,* 73 Wis. 238, 40 N. W. 683, which was an action to quiet title to land, the conclusion seems to be based upon the idea that the land is the subject of the action, although the proposition is not definitely stated in the opinion. In *Grignon v. Black,* 76 Wis. 674, 45 N. W. 122, 938, which was an action to quiet title, it was said, considering the counterclaim statute, that the subject of the plaintiffs' action was "their title and right of possession to the land in question."

The radical inconsistency in these holdings is very apparent. In a trespass action, which is brought to redress a wrongful entry on land, the subject is the tort and not the land; in an ejectment action, which is brought to redress a wrongful holding of land, the subject is the land and not the tort; while in *quia timet* the subject is said in one case to be the land itself, and in another to be the plaintiff's title and right of possession of the land.

But this is not all. As we have seen, it was held in the *Scheunert Case* in the 23d Wisconsin that in an action for conversion the subject was the tort or wrong committed; but in the later case of *Mulberger v. Koenig,* 62 Wis. 558, 22 N.

W. 745, which was an action in equity to prevent the wrongful obstruction of a mill-race, it was said that the subject of the action "is nothing more or less than the facts constituting the plaintiff's cause of action." This latter case was followed in *Telulah P. Co. v. Patten P. Co.* 132 Wis. 425, 112 N. W. 522 (another water-power case), where it was said that the subject of the plaintiff's action is "his right and the invasion of that right" by the defendant; and this definition was approved and applied in *Brahm v. M. C. Gehl Co.* 132 Wis. 674, 679, 112 N. W. 297.

Now can it be possible that it is true that the subject of the action, as the term is used in the Code, means the plaintiff's right and the defendant's invasion of that right? If so, then it is synonymous with cause of action, and we should be able to substitute the words "subject of the action" for "cause of action" wherever they occur in the Code, and *vice versa*. It is very certain that we cannot do this without making nonsense of the Code and convicting its authors of the reckless use of misleading language in the crucial paragraphs of a law which was intended to completely revolutionize all legal procedure.

There is another class of cases in this court in which the subject has received passing consideration, viz.: the cases involving the winding up of the affairs of insolvent corporations and the enforcement of the liabilities of corporate officers and stockholders. In these cases the settlement of the corporate affairs, the enforcement of the various liabilities, and the administration of the trust fund have been said to constitute the "subject" or "subject matter" of the action (not, however, in direct reference to the joinder section of the statute); and it has also been said in these cases that the various liabilities sought to be enforced in such actions are not separate causes of action, but mere incidents of one cause of action, *i. e.* the "settlement of the corporate affairs." In the first of the cases cited below, "subject matter" and "cause of action" seem to be considered practically the same. *Gager v. Mars-*

den, 101 Wis. 598 (see p. 604), 77 N. W. 922; *Harrigan v. Gilchrist,* 121 Wis. 127 (see p. 296 *et seq.*), 99 N. W. 909; *Foster v. Posson,* 105 Wis. 99, 81 N. W. 123.

Again, there are several cases, which can hardly be classified under any given head, in which the question was whether one or several causes of action are stated in the complaint, and in the treatment of that question the term *subject of action* or *subject of litigation* has been used and given a meaning, not, however, with direct reference to the joinder statute. Thus, in *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229, which was an action by a corporation against alleged conspirators to recover back corporate assets and set aside a fraudulent judgment, it was said, in answer to the objection that two causes of action were improperly joined, that "there is but one subject of action, the conspiracy to defraud and its consummation to the damage of the plaintiff."

In *Jordan v. Estate of Warner,* 107 Wis. 539, 83 N. W. 946, which was a claim against an estate for the proceeds of lands alleged to belong to the plaintiff, but sold by the deceased as plaintiff's agent, involving also a claim that a deed of the lands made to the deceased was in fact a mortgage, it was said: "The sole primary subject of the litigation was the alleged indebtedness of the estate to plaintiffs."

In *Adkins v. Loucks,* 107 Wis. 587, 83 N. W. 934, which was an action by the creditor of a deceased person to enforce the liability of heirs under sec. 3274, Stats. (1898), who had received the real estate of deceased, other parties being joined to whom part of the land had been fraudulently conveyed, it was said:

"The infallible test by which to determine whether a complaint states more than one cause of action is, Does it present more than one subject of action or *primary right* for adjudication?" And again: "The sole subject of action stated in the complaint being to recover plaintiff's claim out of the land that descended to the Loucks heirs," the setting aside of the fraudulent deeds is germane to that subject.

Other Wisconsin cases in which casual attention has been given to the subject are *Alliance E. Co. v. Wells,* 93 Wis. 5, 66 N. W. 796; *Endress v. Shove,* 110 Wis. 133, 85 N. W. 651; *Aultman Co. v. McDonough,* 110 Wis. 263, 85 N. W. 980; *Koepke v. Winterfield,* 116 Wis. 44, 92 N. W. 437; *Krakow v. Wille,* 125 Wis. 284, 103 N. W. 1121; *Tallman v. Barnes,* 54 Wis. 181, 11 N. W. 478, and *Kuhn v. Sol. Heavenrich Co.* 115 Wis. 447, 91 N. W. 994; but in none of them do we find any helpful discussion of the question.

It seems very evident to us that the cases in this court cannot be harmonized and we shall not undertake the task: the confusion is hopeless. Looking to the decisions in New York and other Code states, as well as to the attempts of text-writers to solve the difficulty, we find the same confused condition. To attempt to analyze the decisions would be impossible within any permissible limits, but the conclusions of the leading text-writers may profitably be considered.

Mr. Pomeroy, in his valuable work on Code Remedies, has made three attempts to define the term *subject of action.* At sec. 369 (4th ed.) he says:

"The term 'subject of action,' found in the Code in this and one or two other sections, was doubtless employed by its authors and the legislature as synonymous with, or rather in place of, 'subject matter of the action.' I can conceive of no other interpretation which will apply to the phrase and meet all the requirements of the context. 'Subject matter of the action' is not the 'cause of action,' nor the 'object of the action.' It rather describes the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted. It is possible, therefore, that several different 'transactions' should have a connection with this 'subject matter,' or, what seems to me to be the same thing, with this 'subject of action.'"

This seems a fairly definite and workable definition as applied to actions relating to specific real or personal property, but in sec. 384 of the same work, after discussing and criti-

cising the definition given by Mr. Calvert in his work on Parties, he says:

"In equitable actions there is generally, if not quite always, a fund, or estate, or property, which is the subject of the suit, as well as questions concerning the same to which the term may also be applied. The provisions of the Codes, however, embrace legal actions; and in them it cannot generally be said that there is any fund, property, or estate, in relation to which the questions at issue have arisen, and which can be regarded as the 'subject.' In a very large proportion of legal actions, therefore, the term 'subject of the action' can only be conceived of in the second sense which has been attributed to it, and denotes the totality of questions at issue between the parties, embracing, in short, both the primary rights and duties of the litigants, and the remedial rights and duties which have sprung from the injuries complained of. The term does not seem capable of any clear and complete analysis, and the result is that it may denote the 'thing,' if any,—land, chattel, person, fund, estate, and the like,—in respect of which rights are sought to be maintained and duties enforced, or it may denote the sum of the questions between the parties to be determined by the judgment of the court. The latter meaning is distinguishable and is to be distinguished from the 'object of the action,' which is always the relief to be obtained by the determination of the questions which constitute the 'subject of the action.' "

This seems sufficiently vague and confusing, but when we come to the discussion of the term under the counterclaim section, at sec. 651 of the same work, we find a definition which seems to disregard the previous discussions entirely, viz.:

"It would, as it seems to me, be correct to say in all cases, legal or equitable, that the 'subject of the action' is the plaintiff's main *primary right,* which has been broken, and by means of whose breach a remedial right arises. Thus, the right of property and possession in ejectment and replevin, the right of possession in trover or trespass, the right to the money in all cases of debt, and the like, would be the 'subject' of the respective actions. Although in a certain sense, and in some classes of suits, the things themselves, the land or chat-

tels, may be regarded as the 'subject,' and are sometimes spoken of as such, yet this cannot be true in all cases; for in many actions there is no such specific thing in controversy over which a right of property exists. The primary right, however, always exists, and is always the very central element of the controversy around which all the other elements are grouped, and to which they are subordinate. In possessory and proprietary actions, this right, which will then be always one of property or of possession, will be intimately associated with the specific thing itself which is the *object* of the right; but this relation is not and cannot be universal. It seems, therefore, more in accordance with the nature of actions and more in harmony with the language of the statute to regard the 'subject of the action' as denoting the plaintiff's *principal primary right* to enforce or maintain which the action is brought, than to regard it as denoting the specific thing in regard to which the legal controversy is carried on. In this manner alone can we arrive at a *general* rule applicable to all possible cases, and the rule thus reached fully satisfies all the requirements of the legislative language, and can be invoked in all classes of actions. While I suggest and adopt this meaning of the term 'subject,' I freely concede that no decision, so far as I have discovered, pronounces this interpretation to be the only one admissible; many cases sanction it, none directly reject it; but none, on the other hand, have gone so far as to declare in its favor to the exclusion of all other meanings. The construction proposed, as it has been judicially approved in many instances, would remove all doubt and conflict of opinion, and would furnish a simple and practical rule of universal application."

Acknowledging as we do Mr. Pomeroy's very valuable services to the profession and to the law, we think it must be admitted that he also has left the question of the meaning of "subject of action" in great confusion.

Mr. Nichols, in vol. 1 of his work on New York Practice, at page 68 quotes Mr. Pomeroy's first definition, "the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted," and escapes any further difficulty by not attempting any additional discussion of the subject.

Mr. Bliss, in his work on Code Pleading (3d ed.), has also attempted to reach a conclusion on the subject, and perhaps with some greater degree of success. Thus he says at sec. 126:

"The cause of action has been described as being a legal wrong threatened or committed against the complaining party; and the object of the action is to prevent or redress the wrong by obtaining some legal relief. The subject of the action is, clearly, neither of these; it is not the wrong which gives the plaintiff the right to ask the interposition of the court, nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is, ordinarily, the property, or the contract and its subject matter, or other thing involved in the dispute."

He then proceeds to state what he deems to be the subject matter of various contract actions, and proceeds with the consideration of tort actions as follows:

"In an action for a tort, the injury complained of is the wrong, and the subject of the action would be that right, interest [relation], or property which has been affected—as, in replevin or trover, the property taken; for libel or slander, the plaintiff's character or occupation; for an injury to a servant, the service; for the seduction of, or for harboring a wife, the marital relation; for negligence, the duty, property, or person in respect to which the negligence occurred; for false imprisonment, the plaintiff's liberty; and for trespass upon property, the property."

He also clearly appreciates that the words should be held to mean the same thing wherever used, and in sec. 373 makes the following observations concerning the term as used in the counterclaim statute:

"I know of no reason why the same interpretation should not be given it in this connection as when it is used to designate a class of causes of action that may be united in one proceeding, and the reader is referred to the view heretofore taken. This general view is not elaborated in any of the re-

ported cases—it is not, perhaps, the duty of judges to write essays, only to apply the law to the facts before them,—but by a preponderance of authority, it is recognized, and the cloudiness, if not blunders, that are seen in this connection, have arisen chiefly from a failure to distinguish the 'subject' of the action from the 'cause,' or from the 'object' of the action, or from the facts which constitute it. Our system of pleading will never be reduced to scientific accuracy until the statutory phrases embodying it come to have a fixed signification. Technics are essential to exact knowledge. The pleader may state, in common language, the facts that constitute his cause of action, because he describes the common events of life, and yet, at every step, he is controlled by the stern rules of legal logic. Looseness, indefiniteness, uncertainty in the interpretation of phrases that control his action, leave him wholly at sea, and tossed about by the shifting winds of mere opinion, or, perhaps, caprice. It is because a fixed and definite meaning has not been given to the term 'subject of the action'—because it so often fails to present to the mind any distinct conception,—that we find so many differences of opinion in respect to this class of counterclaims, and, as we shall presently see, nowhere does the conception seem to be less certain than in the great state to whose jurisprudence we owe so much, and whose enlightened bar first called the new system into existence."

In this connection we will again refer to the case of *Scarborough v. Smith,* 18 Kan. 399, where, under the joinder clause which we are considering, it was held that an action of ejectment, an action to recover the value of the rents and profits of the same property, and an action for partition thereof could be joined because they all arose out of transactions connected with one subject of action, which was said to be "the right to use and enjoy in the manner he chooses his interest in said real property with all the proceeds and avails thereof." And it is further said: "Of course the '*subject* of action' is not the '*cause* of action,' or the cause of *any* action, or *any cause* of action. It is simply one of the elements of each of the several causes of action, uniting and binding them together in one action."

We are not to be understood as approving without qualification the propositions laid down by Pomeroy and Bliss in the quoted paragraphs. The quotations have been made rather for the purpose of showing the drift of thought on the subject in two acute legal minds. We do not propose in the present case to attempt to lay down any hard-and-fast definition which shall be applicable to all cases which may arise. Sufficient unto the day is the evil thereof.

But we feel that we must recede from the proposition laid down in the *Telulah Case* (132 Wis. 425, 112 N. W. 522), to wit, that the subject of the action is composed of the plaintiff's right and the defendant's invasion thereof. If the phrase stood alone, this might be logically correct; but when we face the fact that we must differentiate *subject of action* from *cause of action,* and when we also know that the definition last quoted *must* be applied to *cause of action,* we must find some other meaning for subject of action.

It seems probable, as Mr. Pomeroy suggests, that the Code makers used the term having in mind the term *subject matter of the action,* which was in use before the Code, and which is defined by Bouvier as "the cause, the object, the thing in dispute." It seems also probable that they had in mind equitable actions involving complicated matters arising out of and surrounding a single parent stem or primary right, which manifestly ought to be all handled at the same time and by the same court in order to settle closely related rights; but we cannot assent to the suggestion of Mr. Pomeroy (sec. 369) that it probably has no application to legal causes of action, although it was said by this court in the *Emerson Case,* 124 Wis. 369 (102 N. W. 329), at page 389, that "doubtless . . . the second clause of the statute applies more generally, if not exclusively, to equitable suits."

There can be little doubt that the clause will find its most frequent application in equitable actions, but the Code makers neither had nor expressed any intention to limit it in that way. The very wording of the introductory words of the

clause precludes that idea: causes of action "whether . . . legal or equitable or both" may be joined where they arise out of transactions connected with the same subject of action. They intended to give the court power to lay hold of, sift out, and determine in one action rights and wrongs between the same parties which had this element of unity, and they did not intend to limit this broad power in any way. It should be construed and administered by the courts with a view to most effectively and fully carry out its purpose so far as may be consistent with the orderly and prompt administration of justice and the preservation of the rights of litigants.

We have before us two causes of action, one by the owner of certain lands to prevent the further assertion of a wrongful claim of title to those lands, and another to recover for a wrongful entry on the same lands by the same person. Can they be joined? They do not arise out of the same transaction. One arises out of some oral or written claim, the other out of an actual physical entry on the land. Both of these are transactions under the rule heretofore given, but are they both connected with the same subject of action? Evidently we are obliged to define the words *subject of action* to reach an answer.

If we say that the subject of the action is the plaintiff's alleged right alone, *i. e.* his title, then could it be said logically that the physical trespass on the land was in any way connected with the subject? On the other hand, if we say that the subject of the action is the land alone and not the plaintiff's title thereto, could it be said logically that the false claim of title was connected with the subject? The questions suggest that either holding would be too narrow, and that with better reason it should be said in a case like the present that the subject of the action is composed both of the land and the plaintiff's alleged title taken together. Indeed, this seems the only logical holding. How can the title be disassociated from the land itself? The land must exist in order

that there be any title, and both land and title must exist together if the plaintiff have any standing in court or any right to ask for affirmative action by a court of justice in his behalf.

Now, if the subject of the action, in cases like the present, be the land and the plaintiff's title taken together, then any transaction which is connected with either the land or the title is connected with the subject of action because the two are inseparable.

There are two reasons why, in actions involving conflicting claims or interests in specific real or personal property, the property itself must be considered as an essential part at least of the subject of the action: *First,* because if it be not so, then the Code provisions before cited, which provide (1) that certain classes of actions shall be tried in the county where the subject of the action is situated, and (2) that the summons may be served by publication where the subject of the action is real or personal property in this state, become nonsense, because they can apply to nothing; *second,* because when it is admitted that in using the words *subject of action* the Code makers had in mind the idea of subject matter as used before the Code, it must also be admitted that the words cover the specific real estate in any action where conflicting claims to such real estate are in issue. Subject matter as used before the Code, when applied to such a case, meant the real estate itself. *Burrall v. Eames,* 5 Wis. 260.

But if it were to be held that the words in question refer only to specific real and personal property, then they could not apply to the actions involving only rights and wrongs not connected with specific property, and as to these latter actions, comprising the great mass of ordinary litigation, there would either be no subject of action at all or the subject of action would be something of entirely different nature. It seems that something like a uniform rule should be established if it be possible. The Code makers were striving for uniformity as well as for simplicity. If some essential basic element can be

found which inheres in all causes of action, local as well as transitory, real as well as personal, which, in actions involving specific property, can be joined with the specific property, both together forming the subject, and which in other actions can stand alone or in connection with the intangible thing involved, like the character in slander, and form the subject, it would seem that this might be said to solve the problem.

It seems to us that this basic and fundamental element is to be found in the plaintiff's *main primary right,* for the invasion of which the action is brought. Thus, in controversies involving conflicting claims to specific real or personal property, the property itself plus the right, title, interest, claim, or lien upon that property which the plaintiff alleges and which gives him his standing in court, is to be considered as forming the subject of the action, and he may join to his first cause of action another based on a different transaction from the first, but which is connected with reasonable directness with either the property itself or with the plaintiff's title or interest therein alleged in the first cause of action. It seems to us that this solution of the questions harmonizes all of the Code provisions which use the term, and that it also solves to a very large extent, if not completely, the difficulties found by Mr. Pomeroy and which seem to have compelled him to disagree with himself. We think the principle will be found to be capable of satisfactory application to actions not involving property, but simply involving personal rights and wrongs. As said by Mr. Pomeroy at sec. 651: "The primary right, however, always exists, and is always the very central element of the controversy around which all the other elements are grouped and to which they are subordinate."

We therefore come to this conclusion: that in possessory and proprietary actions, whether involving real or personal property, the subject of action is composed of the plaintiff's primary right together with the specific property itself. Further than this we do not go, except to say that, as it seems to

us, the plaintiff's primary right which is alleged to have been invaded must in all other actions be held to be an essential part, and perhaps in many cases the whole, of the *subject of the action* as those words are used in the Code.

It follows that the two causes of action before us are properly joined.

By the Court.—Order affirmed.

VINJE. J.. took no part.

GREAT NORTHERN RAILWAY COMPANY, Respondent, vs. MCCORD, Appellant.

October 4—November 15, 1910.

Judgment: Res judicata: *Railroads: Condemnation of land: Wrongful occupancy: Damages: Foreign railroad companies: Statutes construed.*

1. A decision of the supreme court, in an action by a landowner against two railroad companies, one the lessee of the other, to enjoin them from using his land for railroad purposes, to the effect that they are trespassers upon the land and that the circuit court erred in permitting them to occupy the same before acquiring a right thereto by proper condemnation proceedings, is *res judicata* between the parties and binding upon such lessee even after it has acquired the title and franchises of its lessor by deed from the latter and has instituted new condemnation proceedings against the property in its own name.
2. In such case neither company acquired any claim or color of title to the premises under the order of the circuit court, and subsequent steps taken by the grantee to obtain a new certificate of convenience and necessity from the railroad commission and to condemn the land cannot, therefore, be treated as having been instituted to perfect a defective title, so as to entitle it to a stay of proceedings in the landowner's action to enjoin the further use of the premises, and to an order permitting it to continue its occupancy pending the condemnation proceedings, under the provisions of sec. 1852, Stats. (1898).

3. Where, after an action is begun by a landowner against a railroad company which has wrongfully taken possession of his land, to restrain the use of the land for railroad purposes and to recover damages for the trespass, the railroad company institutes condemnation proceedings against the land in question, the damages awarded such owner in the trespass action should not include those incident to any change in the premises caused by the grading of the roadbed or by other acts affecting the physical condition of the land, since such elements of damage must be taken into consideration in the condemnation proceedings.
4. The right of eminent domain cannot be exercised by foreign railroad companies unless expressly granted to them by law.
5. The omission from sec. 1845, R. S. 1878, of the words "formed under this act or organized under any law of this state," contained in sec. 13, ch. 119, Laws of 1872, and the further omission of the provisions of sec. 55 of the same act, are significant as indicating that the revised law was intended to embrace all railroads and to be of general application, and it is accordingly *held* that the power of eminent domain is conferred on all railroad corporations doing business in this state regardless of whether they are domestic or foreign organizations.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

The Eastern Railway Company of Minnesota, a corporation existing under the laws of Wisconsin, sought to condemn lands for an extension of its railroad. Among the lands sought to be condemned were lands of *Warren E. McCord* in the city of Superior. A certificate of convenience and necessity was issued by the railroad commission of Wisconsin. Upon appeal to this court from the order of the circuit court appointing commissioners to ascertain and appraise the compensation to be made to the owners of the real estate described in the above mentioned condemnation proceeding instituted by the Eastern Railway Company, the order was reversed, on the ground that the board of directors of the Eastern Railway Company had not passed a resolution designating the route of the proposed extension, and because the certificate of convenience and necessity issued to the railway company improperly granted the company the privilege of constructing a part only of the railroad found to be necessary.

In August, 1907, the Eastern Railway Company entered upon and began excavating on the lands of *Warren E. McCord* in the city of Superior, and on August 21, 1907, Lyman T. Powell, *Mr. McCord's* attorney and agent at Superior, learned of the entry and notified *Mr. McCord* at Portland, Oregon, thereof. On August 23, 1907, Mr. Powell was directed to proceed to have the railroad enjoined from further prosecution of the work. Upon learning on September 17, 1907, that the railway company purposed to lay its tracks upon these lands, Mr. Powell commenced an action to restrain the Eastern Railway Company and the *Great Northern Railway Company* from doing this work and from occupying the premises. The *Great Northern Railway Company* was made a defendant in this action because it had a long-time lease of the railroads of the Eastern Railway Company and was alleged to be under the same management. On October 5, 1907, the preliminary restraining order, which had been issued as to both of the defendants, was dissolved by the circuit court and the defendants were permitted to continue in possession of the plaintiff's premises upon condition that they give a bond in the sum of $20,000 to indemnify the plaintiff for his damages. On appeal to this court from this order, the order was reversed and the action remanded for further proceedings according to law.

After the case was remitted to the circuit court and was there called for trial, the petitioner herein, the *Great Northern Railway Company,* upon its petition and corroborating affidavits showing that under date of July 1, 1907, the Eastern Railway Company had made a deed of the whole of its franchises, railway property, appurtenances, and rights to the *Great Northern Railway Company,* the deed being delivered on October 11, 1907; that the petitioner had in February, 1909, instituted proceedings by petition asking condemnation of the premises which the Eastern Railway Company had sought to condemn for identical purposes, and for the appointment of commissioners for that purpose; and that the com-

missioners appointed on October 15, 1907, had appraised the compensation to be made to *Warren E. McCord* at $1,249 and that this amount had been paid into court, asked a stay of the proceedings in the action brought by the plaintiff, *Warren E. McCord,* and that it be given permission to continue in possession of the premises during the pendency of its condemnation proceedings. Upon this showing the circuit court made an order staying all further proceedings in the action brought by *Warren E. McCord* against the Eastern Railway Company and the *Great Northern Railway Company* and permitted the *Great Northern Railway Company* to continue in possession of the lands of *Warren E. McCord* on condition of giving a bond in the sum of $5,000 to pay any damages suffered by *Warren E. McCord* by reason of the occupancy of his lands and on the further condition of the prompt prosecution of the condemnation proceedings. This is an appeal from such order.

For the appellant there were briefs by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

For the respondent there was a brief by *J. A. Murphy* and *W. M. Steele,* and oral argument by *Mr. Steele.*

SIEBECKER, J. The appellant contends that the court erred by its order permitting the respondent, the *Great Northern Railway Company,* to occupy the premises of *Warren E. McCord,* the appellant, during the pendency of the proceeding instituted by it for the condemnation of a strip thereof to be used for railroad purposes, and that it was error to restrain the appellant from prosecuting his action against the railway companies to enjoin them from continuing in possession of the land and from using it for such railroad purposes during the pendency of the condemnation proceedings. Upon an appeal to this court from an order in the action of *McCord v. Eastern R. Co.* and this respondent, reported in 136 Wis. 254, 116 N. W. 845, it was held that the complaint in the case

stated a good cause of action for an injunction, and that the circuit court erred in permitting the railroad companies to occupy said premises for railroad purposes before they had acquired any right thereto by a proper condemnation proceeding pursuant to the statutes, for the reason that under the facts and circumstances shown by the pleadings and affidavits then before the court it appeared that *Warren E. McCord* had given no express or tacit consent to such occupancy by the companies. The decision went upon the ground that any such permanent appropriation of land without the consent of the owner is a taking thereof in the constitutional sense, which is unauthorized in the law; and it was held that such unlawful entry would be restrained in equity, because the remedies available to the owner at law are less adequate, comprehensive, and efficient to the ends of justice and its prompt administration. It was therefore held that the plaintiff in that action was entitled to proceed with the prosecution of his suit, in which respondent had been made a defendant, upon the ground therein alleged that it then occupied this land as the lessee of the railroad owned by the other defendant, the Eastern Railway Company.

The questions thus decided upon that appeal are *res judicata* as to the respondent on this appeal. We can perceive no reason for holding on this appeal that the respondent, the *Great Northern Railway Company,* should not be bound by such former decision to the extent of the questions then presented and decided, unless, as it now contends, the situation is changed. This alleged change of situation is based on the showing to the court, before the making of the order now appealed from, that the deed of the Eastern Railway Company of October 11, 1907, conveying all of its railroad properties and transferring the possession thereof, included a right to occupy the lands, which was not embraced in the former decision, and that by obtaining a certificate of convenience and necessity for the construction of a railroad over the premises

which the Eastern Railway Company actually occupied, and by immediately thereafter prosecuting in the proper circuit court a condemnation proceeding to acquire the lands for such railroad purposes, the respondent acquired the right under sec. 1852, Stats. (1898), to remain in possession of the premises and to operate its railroad for a sufficient time to enable it to prosecute the condemnation proceeding to completion. This right is asserted under the provisions of sec. 1852, Stats. (1898), providing that if a railroad company has not acquired title to land upon which it has constructed any part of its roadbed or track, "or if at any time after an attempt to acquire title by purchase, eminent domain or otherwise it shall be found that the title thereby acquired is defective the corporation may proceed to acquire or perfect such title in the manner hereinbefore provided; and at any stage of such proceeding the court in which the same shall be pending or the judge thereof may authorize such corporation, if in possession, to continue in possession," and use the land for its purposes during the pendency of the proceedings upon compliance with the conditions as to indemnity there prescribed. The argument is that under the facts of the case the respondent, as successor to the Eastern Railway Company, is in lawful possession of this strip of land, by reason of the fact that its predecessor took the necessary steps to acquire title thereto, although it failed to acquire a title on account of irregularities and defects in the certificate of convenience and necessity, and because the court awarded its grantor possession thereof during the pendency of the condemnation proceedings instituted by it. It is undisputed that this possession was held illegal and wrongful by the decision of this court in the case of *McCord v. Eastern R. Co.* 136 Wis. 254, 116 N. W. 845. It is there stated:

"The broad language of sec. 1852, so much relied upon by counsel for defendants, we think cannot be construed to mean that a railroad company may take and hold possession without the consent of the landowner and without first making or

tendering compensation. And it is manifest from the provisions of sec. 1850 that such was not the intention of the legislature. The latter section provides that after the making of the award the company may pay to the owners of the land taken or to the clerk of the court the amount of the award, and thereupon may enter upon, take, and use the land. This language seems to negative the idea that the land can be taken before compensation is made."

It was consequently held that the defendants' entry was unlawful and that the court erroneously permitted the railroad companies to remain in possession of the premises. It is obvious that neither the Eastern Railway Company nor the respondent acquired any claim or color of title to the premises under the circuit court's order which authorized possession pending the proceedings to condemn, for a railroad company has no right to go into possession of land which it wishes to condemn, before an award is made and payment of the amount awarded is made to the owner of the land or to the clerk of the court. The former decision of this court in the case of *McCord v. Eastern R. Co.* and the respondent, holding that their entry and continuance in possession under the court's order constituted a trespass, must be adhered to. The subsequent steps taken by the respondent to obtain a new certificate of convenience and necessity and the commencement of new condemnation proceedings cannot, therefore, be treated as instituted to perfect a defective title to land to which it had theretofore acquired any right by purchase or eminent domain. Under the facts disclosed the respondent and its grantor were wrongfully occupying this land without any justifiable claim thereto, and it cannot therefore be said that their possession of the premises is under an imperfect title as contemplated by sec. 1852, Stats. (1898). The court therefore erred in permitting the respondent to remain in possession and in restraining the appellant from prosecuting his action to enjoin the respondent from further trespass to his possession and for compensation for the loss sustained.

Since the respondent has instituted condemnation proceed-

ings against the lands in question and for the assessment of the owner's damages for such taking, it is manifest that the damages incident to any change in the premises caused by the respondent or its grantor by grading the roadway or by other acts which affected the physical condition of the land must be taken into consideration in determining the damages to be awarded the landowner in such proceeding. Under the circumstances, such elements of damage should not therefore be included in any award of damages in the appellant's trespass action. In that action the damages should be restricted to the loss occasioned by the invasion of the right of possession and which is not embraced in an award in the condemnation proceeding.

It is contended that the respondent is a foreign corporation organized under the laws of Minnesota and hence has no authority to exercise the right of eminent domain in this state. Confessedly, this right cannot be exercised by foreign corporations unless it be granted them by the law. Sec. 1845, Stats. (1898), provides:

"Any railroad corporation may acquire any real estate which it shall be authorized to take for the purpose of its organization in the manner hereinafter prescribed; and every provision for that purpose heretofore made in any special law or act of incorporation or amendment thereto is repealed."

Sec. 13, ch. 119, Laws of 1872, relating to railroads and the organization thereof, provided for the exercise of this right as follows:

"In case any railroad company formed under this act or organized under any law of this state, shall not have acquired any real estate required for the purposes of its incorporation, it shall have the right to acquire title to the same, in the manner and by the special proceedings prescribed in this act."

By sec. 55 of this chapter it was enacted:

"Sec. 55. All existing railroad corporations within this state shall respectively have and possess all the powers and

privileges contained in this act, and they shall be subject to all the duties and liabilities prescribed by this act."

The context of this section, read in connection with the provisions of sec. 13, shows that the legislature contemplated that all the powers and privileges contained in this act should be conferred on corporations other than those embraced in sec. 13, namely, those "formed under this act or organized under any law of this state." This must, therefore, have referred to corporations of foreign organization but doing business in this state. This remained the law until the adoption of the revised law contained in sec. 1845, R. S. 1878. The revisers' note states that the original section was "amended to give a certain expression to the abolition of special provisions," and cites cases. The omission of the words "formed under this act or organized under any law of this state," contained in sec. 13, and the omission of the provisions of sec. 55 altogether from sec. 1845, are significant as indicating that the revised law was intended to embrace all railroads and to be of general application, and that the provisions were not to be restricted to such corporations as were organized under the original act or under any other law of this state. The omissions and the phraseology of the new law manifest a purpose to so frame the revised law as to include within its provisions any railroad corporation. Such a purpose could only be accomplished by conferring the rights on all railroads doing business in this state, regardless of whether they were domestic or foreign organizations. Many of the different sections of our statutes, pertaining to the organization of railroads, the granting of rights and powers, and regulating the exercise of such rights and powers, have been cited to our attention by counsel for both parties as tending to show the legislative intent in the adoption of this amendment to the original statute, as incorporated in sec. 1845. An examination thereof affords us no satisfactory evidence showing the legislative intent respecting this matter. A study of the contexts of these

various provisions discloses that they harmonize with the apparent meaning of the provisions of sec. 1845, and therefore furnish no ground for restricting the natural meaning of the words employed and for not applying them in their usual significance and scope. We are persuaded that the respondent, though a corporation organized in another state, has the right to exercise the right of eminent domain within this state for the purposes of its organization.

By the Court.—The order appealed from is reversed, and the proceeding remanded for further proceedings according to law.

MARSHALL and VINJE, JJ., took no part.

THOMPSON, Respondent, vs. AMERICAN WRITING PAPER COMPANY, Appellant.

October 26—November 15, 1910.

Master and servant: Dangerous machinery: Negligence: Proximate cause: Contributory negligence: Questions for jury: Changing verdict.

In an action by an employee in a paper mill whose hand was caught and crushed between two rolls, one of which he was cleaning by applying a cloth to it after he had started the machine for that purpose, it is *held* upon the evidence that neither the alleged negligence in failing to warn plaintiff that the speed of the rolls was for a few seconds gradually accelerated after the machine started, nor any other negligence of defendant, had any causal relation to the injury, and also that plaintiff was guilty of contributory negligence in operating the machine as he did. A verdict for defendant should therefore have been directed, or the answers in a special verdict finding defendant negligent should have been changed by the court.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

Plaintiff was injured by reason of his right hand being caught and crushed between two rolls in the defendant's mill. The rolls in question were set in an upright frame, one above the other, and were about eighteen inches in diameter and four or five feet long and made about sixteen revolutions per minute when running at full speed, or ran about seventy-five feet. The rolls were set about five eighths of an inch apart. The top of the lower roll protruded slightly above the table in front of the machine, behind which the operator stood when at work. Plaintiff was operating the machine when injured, and it was his duty to pass books of paper between the rolls. These books are loose sheets put up in book form. They are run several times between the rolls, and subjected to great pressure for the purpose of giving the paper a smooth linen finish. The operation is carried on by laying the book on the table of the machine in front of the rolls and then pushing a hand lever which throws a belt onto an active pulley which starts the rolls. The book is pushed over the table so as to come in contact with the rolls and is then caught by them and carried between. The hand lever is then pulled back, which throws off the outer belt, and an inner one is thrown onto an active pulley and the rolls instantly reverse and bring the book back. After the book is passed several times between the rolls in this way, it is laid aside and the same process is gone through with another one.

Plaintiff had run the machine continuously for one day before he was injured. On the morning of the second day he observed some dirt on one of the rolls and proceeded to remove it, first stopping the machine and getting a cloth, which he held in his right hand, then with the same hand moving the lever which started the machine, then placing the cloth on the lower roll so as to remove the dirt while the roll was in motion. In so doing his hand was caught and he was injured. Plaintiff testified that he had been warned by his foreman that he must remove all dirt from the rolls. Whether he was told to

do so by starting the machine and holding a cloth against the part of the roll to which the dirt had adhered is not clear, and appears, if at all, by inference rather than by any direct evidence. On the day before his injury he had cleaned the rolls a couple of times. Prior to working at the machine on which he was injured he had worked about a month on a stack calender. This consisted of eleven rolls, one resting upon the other, between which paper was passed while being finished, and the testimony tended to show that the principal work of the plaintiff consisted in passing the paper between these rolls of the stack calender. Plaintiff had no other experience in working in paper mills. He lived on a farm until he was twenty years of age, and then did various kinds of work as a common laborer before entering the defendant's employ. He was past twenty-two years of age at the time of the injury.

The complaint alleged that as to the plaintiff the machine had a secret hidden danger, in that when the lever was pushed to start the rolls they started slowly, and thereafter, without apparent reason, greatly increased their speed, and that it was because of such increase in speed that plaintiff's hand was drawn into the machine; and that defendant was negligent in not warning plaintiff of this hidden danger. The jury returned the following special verdict:

"(1) Did the fact that the machine did not start instantly at full speed, but had a momentary and gradual increase, render it more dangerous to the operator than if it had started instantly at full speed? *A.* Yes.

"(2) If your answer to the first question should be 'Yes,' then answer this: Ought the plaintiff by the exercise of ordinary care to have discovered that the machine so operated, and was thereby rendered more dangerous, before his injury? *A.* No.

"(3) If your answer to the first question should be 'Yes,' then answer this: Was the defendant negligent in not informing the plaintiff that the machine did not start instantly at full speed? *A.* Yes.

"(4) If you should answer the third question 'Yes,' then

answer this: Was said negligence the proximate cause of the plaintiff's injury? *A.* Yes.

"(5) If you should answer the fourth question 'Yes,' then answer this: Had the rollers reached their full speed before the plaintiff began to clean the lower roller? *A.* No.

"(6) If your answer to the fifth question should be 'No,' then answer this: Did any increase in the speed of the rollers from the time the plaintiff put his hand on one of them, and the time his hand was caught, contribute to producing his injury? *A.* Yes.

"(7) If your answer to the fifth question should be 'No,' and your answer to the sixth question 'Yes,' then answer this: Ought a man of ordinary intelligence and prudence in defendant's position to have reasonably anticipated that if the plaintiff was not informed of the fact that said machine did not start instantly at full speed, some such injury as he sustained would result to him, from his ignorance of that fact? *A.* Yes.

"(8) Did any want of ordinary care on the plaintiff's part contribute proximately to his injury? *A.* No.

"(11) What amount of money will compensate the plaintiff for his injury? *A.* $4,625."

From judgment entered on the verdict defendant brings this appeal.

The trial court, in his opinion on the motion to change the answers of the jury to certain questions in the special verdict and for judgment thereon in favor of the defendant, stated, among other things, that the fact that the rolls did not start instantly at full speed "had nothing to do with the cause of the injury." He further stated that he refused to grant the motion because he thought that the supreme court, or a majority of the members of that court, would hold that the evidence presented questions for the jury.

For the appellant there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

BARNES, J. As soon as the belt was applied to the pulley which moved the rolls they immediately started to turn at the rate of twelve revolutions per minute. The speed increased gradually while the rolls were making from one third to one half a revolution, when the maximum speed of sixteen revolutions per minute was attained. The lever which shifted the belt on the pulley that turned the rolls was operated by plaintiff with the hand that was injured. Before applying the cloth to the roll he had to release the lever. The application was therefore made after the rolls had been set in motion. The jury might have found that such application was made at some time during the three or four seconds that elapsed between the starting of the rolls and the time they attained their maximum speed. At what time, the evidence does not disclose. The plaintiff admits that he fully appreciated the danger to be apprehended from the rolls when moving at full speed. In order to return the verdict which it did the jury must have found either that the machine was more dangerous when the rolls were running at a low rate of speed than when they were running at their ordinary rate, or that it was more dangerous while the speed of the rolls was being gradually accelerated within the limits named than it was after they had attained their normal running speed. There was no evidence in the case to support either hypothesis. The verdict at best is the result of mere speculation or guesswork, and the conclusions reached approach closely to the border line of the nonsensical, if indeed they stop there. No claim is made that there was any jerking movement after the belt was applied to the pulley or that the increase in speed was not gradual and uniform. The evidence wholly failed to show any causal relation between the negligence alleged and the injury suffered, and there is no evidence tending to show that defendant was guilty of any negligence whatever which had anything to do with the injury. Furthermore, we see no escape from the conclusion that the plaintiff was guilty of contributory negligence. The case was not one where a sud-

den emergency had arisen which required the servant to act quickly, and where, because he was required to act without deliberation, he chose a dangerous method of doing his work where a safe one was open to him. It was not necessary to operate the rolls at all in order to clean them. Plaintiff seeks to escape from this dilemma by saying that he was instructed to clean the rolls while they were in motion. Conceding this to be true it does not help him. He does not claim that he was instructed to so operate the machine that his hand would be dragged into the rolls if it came in contact with them. It was perfectly obvious that if the rolls were run in the opposite way he could not possibly suffer any injury by contact with them, and the plaintiff either knew or in the exercise of ordinary care should have known of this fact. There is no claim that it made any difference whatever with the cleaning process which way the rolls were set in motion.

A verdict should have been directed for the defendant. Failing to do this, the answers to the questions relating to negligence on the part of the defendant should have been changed on motion of the defendant, and judgment rendered in its favor.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment dismissing the complaint.

ELLISON, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

October 26—November 15, 1910.

Railroads: Injury to land by fire: Negligence: Evidence.

In an action against a railway company for injury to land caused by a fire alleged to have been negligently set, the evidence, though somewhat contradictory and unsatisfactory, is *held* to sustain a finding by the jury that the fire was started on the defendant's right of way by sparks from an engine.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This is an action for damages resulting to the plaintiff's land by fire alleged to have been negligently set by the defendant. The negligence alleged was that the defendant allowed dry grass and other combustible material to accumulate on its right of way and that this combustible material was set on fire by sparks from one of the defendant's passing engines, and the fire thus started spread onto the plaintiff's adjoining land and burned off the peat soil for about six acres of the plaintiff's land, thus rendering it valueless either as farm or pasture land.

The jury returned a special verdict by which they found (1) that the fire was started on the defendant's right of way by sparks from the defendant's engine; (2) that the defendant was guilty of want of ordinary care as to the condition of its right of way at the place where the fire started; (3) that the plaintiff's damages caused by the fire were $439.98. Judgment for the plaintiff was rendered upon this verdict, and the defendant appeals.

For the appellant the cause was submitted on the brief of *William G. Wheeler.*

For the respondent there was a brief by *Feeney & Miller* and *Edward W. Miller,* and oral argument by *T. J. Feeney.*

WINSLOW, C. J. There are but two claims made on this appeal: *first,* that there was no evidence to sustain the finding that the fire started on the defendant's right of way, and, *second,* that the damages found are excessive.

As to the first claim, it must be admitted that the evidence is not very satisfactory. There were but two witnesses for the plaintiff who saw the fire at or about the time of its inception, viz., Mrs. Verhayen, a woman who lived upon the adjoining farm, and her son, Adrian. Mrs. Verhayen testified that she was hanging out clothes about two or three city blocks

distant when the freight train went by and immediately she saw smoke arising in several places on *Ellison's* land, and perhaps some on the track also; that she did not go to the spot, but called her son from the middle of a forty-acre field. The son testified that when he arrived at the spot there was quite a big piece burned on the railroad side and quite a big piece on *Ellison's* side, burning about as much on one side of the fence as on the other. Later he testified that it was burning in two, three, or four different places, some on *Ellison's* land and some on the railroad land, but this latter testimony might well be construed as meaning, not that there were several independent fires, but that there were several places where the fire was fiercely burning, though all might be more or less closely connected together.

The circuit judge, who heard the testimony and who had a much better opportunity for knowing what the witnesses really meant by their somewhat contradictory testimony, held, when this same question was presented and argued before him, that notwithstanding the unsatisfactory character of the evidence the question was fairly one for the jury, and we do not feel that the contrary view is so clear that we would be justified in reversing his conclusion.

It may be said further that the wind was in the right direction to carry the sparks as claimed, and that the appearance of the ground afterwards tended to confirm the idea that the fire started from a spot on the right of way and spread out as it swept before the wind into and across the plaintiff's premises.

The damages found were certainly large, but there was evidence which fully supported the jury's finding.

By the Court.—Judgment affirmed.

BARNES, J., took no part.

PRIES, Administratrix, Respondent, vs. ASHLAND LIGHT, POWER & STREET RAILWAY COMPANY, imp., Appellant.

October 27—November 15, 1910.

Death caused by wrongful act, etc.: Pleading: Who are entitled to damages: Nonresident aliens.

1. In an action for death caused by wrongful act, an allegation that decedent "left surviving him his father and mother, . . . who are nonresident aliens, and his sisters," one of whom is the plaintiff, is construed, in connection with other allegations of the complaint, to mean that the sisters and the decedent were residents of this state.
2. Such an allegation negatives the idea that decedent left surviving a widow or children who would be entitled to the damages recoverable for his death.
3. Nonresident aliens not being within the purview of secs. 4255, 4256, Stats. (Laws of 1907, ch. 581), nor entitled to the damages recoverable thereunder, the existence of such aliens does not debar from the right to such damages other surviving relatives, resident in this state, who would not have such right if the aliens were residents.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

It appears from the complaint in this action that Walter Smith died intestate on April 21, 1909, and that on November 5, 1909, the plaintiff was duly appointed and qualified in the Ashland county court as administratrix of his estate. The complaint alleges that the defendants are domestic corporations conducting their businesses in the city of Ashland. The facts alleged charge the defendants with negligence and that such negligence proximately caused the decedent's death. The complaint states:

"11. That the said Walter Smith left surviving him his father and mother, Carl Schmidt and Bertha Schmidt, who are nonresident aliens, and his sisters, Mrs. Minnie Brooks, and *Ida Pries,* the plaintiff herein.

"12. That the said *Ida Pries,* sister of plaintiff's intestate,

in his lifetime was dependent upon and largely supported by said Walter Smith, and in consequence of his death aforesaid has suffered pecuniary injuries in the sum of ten thousand ($10,000) dollars."

The defendants separately demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The specific objections to the complaint are that the liability created by secs. 4255 and 4256, Stats. (Laws of 1907, ch. 581), and the right to the benefits thereof are not available to the plaintiff for the reasons:

"1. That the complaint does not show any person in being entitled to take, but does show that the persons in being who would be entitled to take are barred from taking because of their being nonresident aliens.

"2. Because the complaint does not negative the idea that a widow or children survived Walter Smith."

The trial court overruled each of the separate demurrers. This is an appeal by the power company from the order overruling its demurrer to the complaint.

For the appellant there was a brief by *Bundy & Wilcox*, and oral argument by *R. P. Wilcox*. They cited *Woodward v. C. & N. W. R. Co.* 23 Wis. 400; *Brown v. C. & N. W. R. Co.* 102 Wis. 137; *Luessen v. Oshkosh E. L. & P. Co.* 109 Wis. 94, 95; *McMillan v. Spider Lake S. M. & L. Co.* 115 Wis. 332, 335; *Quinn v. C., M. & St. P. R. Co.* 141 Wis. 497; *Schmidt v. Menasha W. Co.* 99 Wis. 300; *Rudiger v. C., St. P., M. & O. R. Co.* 94 Wis. 191; *Ean v. C., M. & St. P. R. Co.* 95 Wis. 69, 74.

For the respondent the cause was submitted on the brief of *Gill, Barry & Mahoney.*

SIEBECKER, J. Does the allegation that the decedent "left surviving him his father and mother, . . . who are nonresident aliens, and his sisters, Mrs. Minnie Brooks, and *Ida Pries*, the plaintiff herein," constitute an allegation that the

sisters named are nonresident aliens? To so hold would be contrary to the evident object of the pleader. The rule is that language in a pleading must be liberally construed so as to give effect to its object and purpose. The language here used, considered in connection with the other allegations of the complaint, conveys the idea contended for by the plaintiff, namely, that the sisters and the decedent were residents of this state, and it should be so construed.

Does the complaint show that the decedent left no widow or children surviving him? The allegation that the decedent's father and mother and two sisters named are the persons who survive him negatives the idea that other persons of the classes specified in the statute as entitled to the amount recovered in this kind of actions survived him, and thus makes the complaint sufficient in this respect.

The principal question presented upon the facts alleged is: Can plaintiff maintain this action for the benefit of herself because of the pecuniary loss caused her by the death of her brother, it appearing that the decedent's father and mother survive him and are nonresident aliens? In the case of *McMillan v. Spider Lake S. M. & L. Co.* 115 Wis. 332, 91 N. W. 979, it was held that the rights created by secs. 4255 and 4256, Stats. (Laws of 1907, ch. 581), were not conferred on nonresident aliens. The language employed in framing the statute is general and in its terms is broad enough to include such aliens, but it was considered that, *prima facie*, every legislature must be presumed to intend by its enactments to regulate the rights which subsist among the inhabitants of its own country, and not to affect the rights of foreigners, unless the contrary be expressed or be implied from the absolute necessity of the case. The court there approved the case of *Deni v. Pennsylvania R. Co.* 181 Pa. St. 525, 37 Atl. 558, where it is declared that:

"While it is possible that the language of the statute may admit of a construction which would include nonresident

alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it."

It was therefore held that the context of the statute showed that the legislature intended to embrace within its terms only such persons of the classes named as were residents of this state. This construction is based upon the idea that the law of a country can operate only within its territory, and, *prima facie,* embraces only such persons as are within its jurisdiction. Since such nonresident aliens are not within the purview of the law, it must follow that the legislature did not intend that they should be included within its provisions for the purpose of depriving residents of this state of its beneficial objects. This result is logically embraced in the construction given the statute in the *McMillan Case,* to the effect that it was designed to promote and regulate the interests of the residents of this state. We consider, therefore, that the plaintiff is not debarred from the rights and benefits of the statute by the fact that the decedent left surviving him his nonresident father and mother.

By the Court.—Order affirmed.

SUESS, by guardian *ad litem,* Respondent, vs. J. S. STEARNS LUMBER COMPANY, Appellant.

October 27—November 15, 1910.

Master and servant: Negligence: Unsafe place to work: Evidence: Special verdict: Instructions to jury.

1. In an action for personal injuries caused by the bursting of a steam cylinder near which plaintiff was working, evidence which would justify the jury in finding that the cylinder burst because, by reason of having been twice rebored, the shell was too thin, rather than because of a latent defect therein caused

by a sand hole, was sufficient to sustain findings that the employer was negligent and that such negligence was the proximate cause of the injury.

2. Where a question submitted for special verdict asked whether defendant negligently failed to provide a safe working place by putting in a steam cylinder which was "old, weak, thin, and insufficient," and the jury were instructed that if the bursting of the cylinder was caused by a sand hole they should answer such question in the negative, it was not error to refuse to submit specifically the questions whether the accident was caused by sand holes, and whether defendant ought to have known of such defect.

3. Where the verdict as submitted covers the issuable facts in the case, there is no prejudicial error in refusing to submit additional questions.

4. A party cannot complain that other instructions ought to have been given, even if necessary, where he made no request therefor.

5. The fact that portions of a charge to the jury (in this case as to the preponderance of evidence and as to damages for future suffering) were not as clear and concise as they might have been, is not ground for a reversal if they were not misleading.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action was brought by an infant between sixteen and seventeen years of age, through his guardian, to recover damages caused on the 28th day of May, 1908, by the alleged negligence of the defendant. The charge of negligence is in failure to furnish plaintiff a safe place in which to work. The answer admits the infancy of respondent, appointment of guardian *ad litem*, the corporate capacity of the appellant, the employment of respondent, and some injury, and denies the other allegations of the complaint; also alleges contributory negligence and negligence of fellow-servants. At the close of the plaintiff's testimony appellant moved for nonsuit, which was denied, and at the close of all the evidence moved for a directed verdict, which was also denied. The appellant requested the submission, as part of the special verdict, of the following:

"(1) Was the said steam feed weak by reason of sand holes in the material of which it was composed?

"(2) Was the presence of said sand holes the proximate cause of the bursting of said cylinder?

"(3) Could the defendant have discovered the presence of sand holes by inspection?"

Said request was refused and the jury returned the following verdict:

"(1) Did the defendant, *J. S. Stearns Lumber Company,* negligently fail to provide plaintiff, *Clarence Suess,* with a reasonably safe place where he was required to work, by putting in a section of the steam feed which was old, weak, thin, and insufficient, as alleged? *A.* Yes.

"(2) If you answer the last question 'Yes,' was said negligence the proximate cause of plaintiff's said injury? *A.* Yes.

"(3) Was plaintiff guilty of any want of ordinary care which in any manner contributed proximately to the said injury? *A.* No.

"(4) At what sum do you assess plaintiff's damages? *A.* $3,500."

The appellant seasonably moved the court, after the coming in of the verdict, for judgment notwithstanding the verdict, to amend the special verdict, and for new trial, which motions were denied; but the court reduced the amount of damages named in the special verdict from $3,500 to $2,800 and ordered judgment for that amount, if accepted by the respondent. The respondent consented to the reduction and judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Solon L. Perrin* and *Arthur W. McLeod,* and oral argument by *Mr. Perrin.*

For the respondent there was a brief by *Sanborn, Lamoreux & Pray* and *E. C. Alvord,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. A. W. Sanborn* and *Mr. Walmsley.*

KERWIN, J. 1. It is insisted on the part of the appellant that its motions for nonsuit and directed verdict should have been granted, on the ground that the evidence does not show

that the appellant was guilty of any want of ordinary care which was the proximate cause of the respondent's injury. This argument is based mainly upon the contention that the evidence conclusively shows that there was a sand hole in the cylinder of the steam feed, which constituted a latent defect, and that the appellant had no knowledge or means of knowledge that the cylinder was defective or unsuitable for the purpose for which it was used, and was not chargeable with any knowledge that the cylinder had not been properly inspected. The injury resulted from the bursting of this steam cylinder near which the injured boy, the plaintiff here, was working. A section of the broken cylinder was introduced in evidence and is brought here with the record. It was a cast-iron cylinder and had been rebored at least twice after its construction and had been in use twenty years. The reboring made the shell much lighter and weaker, it being in some places only five sixteenths of an inch, whereas there is evidence that it should have been three fourths of an inch in order to be safe, and the evidence tends to show that it burst because it was too light and not because of a sand hole. One witness testified that it was hard to say whether the sand hole had anything to do with the break. The jury would have been justified in finding upon the evidence that the shell of the cylinder was not thick enough to withstand the pressure, or that the tests made by the appellant were not sufficient or proper to determine the defects. These tests were simply inspections by looking at the cylinder and making what is called the hammer test. It is not claimed by the appellant that any test was ever made to ascertain how much pressure the steam feed would stand. Nor does it appear that the thickness of the shell was ever measured by the appellant. It is very clear to our minds that there was sufficient evidence to warrant the jury in finding that the cylinder burst because the shell was too thin and not on account of a sand hole or any latent defect. This conclusion renders inapplicable to the situation here the

principal authorities cited by counsel for appellant. Nor does it appear from the evidence that appellant ever delegated to any person the duty of ascertaining how thin the shell was, or to make proper inspection. Without further reviewing the evidence it is sufficient to say that there was ample evidence to establish the negligence of the appellant and that such negligence was the proximate cause of the injury.

2. It is also insisted by the appellant that the court erred in refusing to submit the questions proposed by it as part of the special verdict. We are unable to discover any error in this regard. We think the verdict submitted covered the issuable facts in the case, and that no prejudicial error was committed in refusing to submit the questions requested by the appellant. The principal complaint of counsel on the special verdict is that the questions whether or not the steam feed was weakened and burst in consequence of sand holes, and whether the defendant ought to have known of such defect, should have been specifically covered by the special verdict. The court told the jury that if the bursting of the steam feed was caused by the sand holes, then question No. 1 must be answered "No." No request was made to charge by counsel for appellant, therefore he cannot complain that other instructions should have been given, even if necessary. The thinness of the shell of the cylinder existed from the time it was rebored, therefore constituted a defect in the appliance furnished, and amounted to a failure on the part of the appellant to furnish respondent with a safe working place. What has already been said is sufficient to dispose of appellant's argument on motion for judgment notwithstanding the verdict.

3. It is also insisted by counsel for appellant that there should have been a new trial ordered because of errors committed on the trial. It is said that the court erred in admitting the testimony of the witnesses Laacky and Cook, in which they gave their opinion as to the cause of the break.

We think there was no error in the admission of this evidence. Each of these witnesses qualified under the rule and was competent to give opinion evidence on the subject. They were men of practical experience and well informed upon the subject on which the opinion evidence was given.

4. The following portions of the charge were excepted to:

"You are not to find any proposition set out in any question to be a fact unless the party upon whom the burden of proof rests has satisfied you by a preponderance of the evidence of the truth of the proposition set out in such question. If the evidence of the party on whom the burden of proof does not rest weighs as much as, and of course if it outweighs, that of the party on whom the burden of proof does rest, you must answer such question against the party on whom the burden of proof does rest." . . .

"If you find and believe from the evidence that the plaintiff's injuries are of a permanent character, you will bring in such damages for both mental and physical suffering as you are satisfied and believe from the evidence and are reasonably certain that the plaintiff will be obliged to undergo in the future, which resulted from his said injuries, and those several amounts added together will be the amount of damages which you will insert after the word 'answer' and before the word 'dollar' in your verdict."

These portions of the charge excepted to doubtless could have been more clearly and concisely stated, but we do not think the jury was misled by them, and we think no prejudicial error was committed in that regard. Sec. 3072*m*, Stats. (Laws of 1909, ch. 192).

It is also contended that the damages are excessive. The court below reduced the verdict from $3,500 to $2,800, and we cannot say that the verdict as so reduced is excessive. We find no reversible error in the record.

By the Court.—The judgment of the court below is affirmed.

SMITH, Respondent, vs. LENZ and another, Appellants.

October 27—November 15, 1910.

Contracts: Construction: Attorneys at law: Rebate of fees.

A contract between an attorney and persons against whom he has claims for collection and in process of foreclosure, that he will procure for them a loan wherewith to pay the claims and will endeavor to obtain a reduction of the claims, does not carry with it a duty on the part of the attorney to rebate the attorney fees due him from the creditors.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Sanborn, Lamoreux & Pray,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

W. Stanley Smith, respondent, in person.

TIMLIN, J. The plaintiff, an attorney, had in his hands for collection three several claims for three different persons against the defendants. One of these claims was in process of foreclosure. The defendants then agreed with the plaintiff to pay him $25 if he would procure for them a loan to be secured by mortgage to enable them to pay off the claims in plaintiff's hands. The defendants testified that plaintiff was also to procure for them such reduction as he could on the claims in his hands. These claims aggregated about $1,700. In this action by the plaintiff for a balance due him from defendants the trial court directed a verdict for the plaintiff, and the defendants contend that the cause should have gone to the jury on the proposition that under the foregoing arrangement they must have as an offset to plaintiff's demand the advantage of whatever attorney fees he received from his said three clients, because this amounted to a reduction of these claims. One of the appellants testified: "He [plaintiff]

didn't exactly say that he would give us all his fees. . . . He didn't say he wouldn't charge anything for collection and that he would give us what he would otherwise charge. I did not understand that he was going to give us his fee." He also testified that the plaintiff represented that one of his clients, the Port Huron Threshing Machine Company, required $1,000, having made a reduction of $190, and that thereafter he received a letter from this company that they were satisfied with $850 net, defendants to pay the collection fees. The other appellant testified that after he had been informed by plaintiff that this company would accept $1,000, he told plaintiff to write again and see if he could get it down lower, which plaintiff agreed to do. Plaintiff afterward informed him that $1,000 was the minimum of this claim and charged him up $1,000 out of the loan which was procured for the defendants by the plaintiff, but remitted to the Port Huron Company only $850. According to this witness he knew the plaintiff was acting as attorney for these creditors of his when he employed the plaintiff to procure the loan, but he believed that for $25 the plaintiff would procure the loan and would not act for those different companies after that. Plaintiff never told him that he would stop acting for his clients. There was no conversation about that. He understood he was to pay $25 to get this loan, and he did not know who was to pay the plaintiff his collection fees on these three claims. He supposed the $25 covered the whole business, but there was nothing said to that effect.

We see nothing in this calling for a submission to the jury of this peculiar claim of the defendants to recover from the plaintiff the attorney fees earned by the latter. There is no express agreement to that effect testified to, and the jury could not infer such an agreement from any evidence appearing in this case.

By the Court.—The judgment of the circuit court is affirmed.

GLIDDEN STATE BANK, Appellant, vs. SCHOOL DISTRICT No. 2 OF THE TOWN OF JACOBS, Respondent.

October 27—November 15, 1910.

Schools and school districts: Powers of board: Purchase of safe: Ratification: School orders: Stopping payment: Action.

1. Neither sec. 435, Stats. (1898), providing that the school board shall have the care and keeping of the property of the school district, nor sec. 436, authorizing such board to purchase necessary books, blanks, and stationery, gives the board authority to purchase a safe.
2. Having no authority to purchase a safe, a school board cannot by ratification validate a void purchase thereof by individual members of the board.
3. Where payment of a school order has been stopped by the board before action brought thereon, no action can afterwards be maintained on the order, the only remedy being for breach of the contract.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action on a school order dated December 12, 1907, now owned by plaintiff, but originally issued to one W. Stanley Smith for the purchase price of a safe which the latter claimed to have sold to the school district pursuant to a resolution adopted July 1, 1907. On that date, at a meeting of the school district, a motion was carried to raise $50 for a safe for the district. On July 6, 1907, at a meeting of the school board, there was a "motion made by Alex Morris for Mike Schwilke to buy a safe for the district," which was carried. On August 17, 1907, at a meeting of the school board called to order by the clerk and attended by all the members, "the claim of Mike Schwilke for $22.87 was allowed for safe . . . and an order issued to him," which was paid. On October 22, 1907, the balance of $27.17 in the safe fund was duly transferred by the board to the general fund.

It appeared that about August 1, 1907, W. Stanley Smith

had some negotiations with two of the officers of the school board for the sale of the former's safe to the district for $35, and on or about August 1, 1907, such officers loaded the safe on a wagon and took it to the residence of Mr. Prosser, the then clerk. Thereafter, November 23, 1907, there was a "meeting called to order by Alex Morris at 8 o'clock p. m. according to notice for the purpose of allowing certain bills and settle the question of the safe which J. A. Prosser has taken from W. Stanley Smith." At this meeting, at which only two members were present, a motion was made, seconded, and carried, to disallow the bill of Smith. On December 12, 1907, at a meeting duly called, there was a motion made and seconded to allow the bill of Smith for $35 for safe, and the order in suit was made and delivered to him therefor. On January 6, 1908, at a meeting attended by all the members, a motion was made, seconded, and carried, "to instruct treasurer to stop payment of the school order No. 32 for $35, dated Dec. 12, 1907, payable to W. Stanley Smith for safe," and a motion was made and carried that notice to that effect be printed in the Glidden Enterprise and mailed to Smith.

Upon motion of both parties for direction of verdict, the court directed the jury to return a verdict in favor of defendant, and from judgment entered thereon the plaintiff appealed.

W. Stanley Smith, for the appellant.

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

VINJE, J. 1. It is not claimed by the plaintiff that the two members of the school board who negotiated the purchase of the safe from Smith about the 1st of August had any authority to do so, or that their action in any way bound the defendant. But it is claimed that the school board on December 12th, when it allowed Smith's bill, ratified the previous

purchase and that it had the power so to do, and therefore the order issued in payment of such bill was a valid order. It will be seen from the statement of facts that previous to December 12th the board had acted under, and exhausted, the authority given it by the district meeting to purchase a safe. It had bought one, paid for it, and transferred the balance of the safe fund back to the general fund. Hence, if the school board then had any authority to buy a safe it must have been because such authority was vested in it by statute. It is claimed that sec. 435, Stats. (1898), confers such authority. The portion of the section from which the authority is sought to be derived reads: "The board shall have the care and keeping of the schoolhouse, books, apparatus and other property of the district." This simply provides who shall have the custody of property already owned by the district. It in no wise confers any authority upon the board to purchase new property.

Sec. 436, Stats. (1898), provides:

"The board may purchase such books, blanks and stationery as are necessary for keeping a record of the proceedings of meetings and the account of the treasurer, and for doing the business of the district in an orderly manner."

It would be more reasonable to claim the authority under this section, though we are of the opinion that its language cannot be given an interpretation broad enough to confer it; certainly not broad enough to authorize the board to purchase a second safe after one had already been bought under authority given by the district meeting.

The records to be kept by the board are quite simple and not voluminous. They occupy but a small space, and are not of such great value that an irreparable loss would result to the district should they be destroyed or stolen. In view of these facts it cannot be held that the legislature, by the language quoted in the above sections, intended to confer authority upon the board to purchase a safe, and we can find no

other statutory authority for it. If the board had no authority to purchase the safe in the first instance, it could not validate the void purchase by ratification, for that would be doing indirectly what it had no power to do directly. Ratification presupposes authority to do the act that is ratified. *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132.

It appears further that the board stopped payment of the order sued upon before the action was brought. This amounted to a rescission of the contract by the defendant, had one been made, and in such case the only remedy left would be an action for damages for breach of the contract. No action could be maintained upon the order. *Badger State L. Co. v. G. W. Jones L. Co.* 140 Wis. 73, 121 N. W. 933.

By the Court.—Judgment affirm

HELBERG, Appellant, vs. HOSMER, Respondent.

October 27—November 15, 1910.

Torts: Joinder of parties: Deceit: Pleading.

1. One of a number of joint tortfeasors may be sued alone without joining the others, each being responsible for the whole wrong.
2. When a party, either knowingly or without knowledge on the subject, makes material and false representations of fact to another in order to induce him to enter into a contract, and such other without knowledge or the present means of knowledge on the subject is thereby induced to enter into the contract in reliance on the truth of the representations and suffers legal damage by reason thereof, an action for deceit will lie.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action in tort for deceit. The complaint alleges in substance that on and before February 15, 1908, the de-

fendant and one Kuntz were the owners of a dairy farm in Ashland county and desired to engage the plaintiff to operate it on a crop-sharing plan; that the plaintiff was entirely unfamiliar with the farm; that the defendant and Kuntz determined that Kuntz should take the plaintiff onto the farm in order to show the same to him and explain its desirable features, and that pursuant to such determination Kuntz did take the plaintiff onto the farm, and did, for the purpose of inducing the plaintiff to enter into the agreement hereinafter mentioned, knowingly, falsely, and fraudulently represent to him (1) that a certain well upon the farm was capable of producing and did produce abundant water all the year round for watering all the cattle and stock upon the farm, (2) that a certain twenty-four acres of land upon the farm was well drained and usable for agricultural purposes and capable of yielding and had yielded large crops, and (3) that the stock and cattle on said farm were capable of giving and yielding and did give and yield what is known as four per cent. milk; that in reliance upon these false representations and believing the same to be true the plaintiff on the 15th day of February, 1908, entered into an agreement with the defendant and said Kuntz to operate said farm for one year for a compensation consisting of one half the income and products thereof; that pursuant to said contract the plaintiff entered upon the performance of his duties on said farm and continued thereon until the expiration of his said contract. The complaint further alleged that in truth and in fact the well did not flow or give sufficient water all the year round for the cattle and stock upon the farm, but gave so little water during the winter months that plaintiff was obliged to drive the cattle and stock a long distance to water the same at a creek twice a day, whereby the plaintiff was required to expend time and labor, and whereby also the yield of said cattle was necessarily greatly lessened in quantity and deteriorated in quality, to the plaintiff's damage in the sum of $40; that in truth and in

fact the said twenty-four acres of land was not well drained or capable of being used for agricultural purposes, to the plaintiff's further damage in the sum of $75; that in truth and in fact said cattle did not give or produce what is known as four per cent. milk, but a considerably inferior grade, to the plaintiff's further damage in the sum of $85. The demand for judgment was for the sum of $200.

The answer admitted the ownership of the farm and the making of the crop-sharing agreement with the plaintiff and its performance, but denied all other allegations.

At the opening of the trial the defendant objected to the introduction of any evidence under the complaint, because (1) the complaint fails to state a cause of action, and (2) that there is a defect of parties defendant, in that George E. Kuntz of Milwaukee, Wisconsin, is not named as a defendant, which objection was sustained and judgment rendered dismissing the complaint, and the plaintiff appeals.

The cause was submitted for the appellant on the briefs of *Holland & Lovett,* and for the respondent on that of *Ben. S. Smith.*

WINSLOW, C. J. The objection of defect of parties defendant was waived because not taken by demurrer or answer. Sec. 2654, Stats. (1898).

If a complete determination of the controversy could not be had without the presence of other parties, the court should order them to be brought in and should not dismiss the action. Sec. 2610, Stats. (1898). But this was not such a case. If any cause of action at all was stated, it was a cause of action in tort for deceit against one of two joint tortfeasors. It is very familiar law that one of a number of tortfeasors may be sued alone without joining the others: each is responsible for the whole wrong.

The complaint may not be a model of pleading, but when fairly construed we think it states a cause of action to recover

damages for deceit. It charges in effect that the owners of a dairy farm, for the purpose of inducing one who was unacquainted with it to enter into a contract to operate it on shares, caused false representations to be made to such person as to the water supply and as to the drainage and quality of a part of it, and that the plaintiff, relying on such representations and believing them to be true, entered into the contract, operated the farm, and suffered damage by reason of the falsity of the representations.

When a party, either knowingly or without knowledge on the subject, makes material and false representations of fact to another in order to induce him to enter into a contract, and such other without knowledge or the present means of knowledge on the subject is thereby induced to enter into the contract in reliance on the truth of the representations and suffers legal damage by reason thereof, the cause of action is complete. *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406.

By the Court.—Judgment reversed, and action remanded for a new trial.

CHALUTZ, Appellant, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Respondent.

October 27—November 15, 1910.

Costs: Actions appealed from justices' courts: Tender: Statutes construed.

1. Where, on appeal by defendant from a judgment against him in a justice's court, an action is pending for trial *de novo* in the circuit court, a tender under sec. 4266, Stats. (1898), must include the $10 costs provided for in sec. 2925.
2. Sec. 2925, Stats. (1898), is to be construed liberally in favor of the right to recover costs. The words "where there is no new trial in the appellate court" are not limited in their application to cases which are not triable anew in that court.
3. The term "costs of suit incurred" in sec. 4266, Stats. (1898), is not limited to disbursements.

APPEAL from a judgment of the circuit court for Ashland county: E. W. HELMS, Judge. *Reversed.*

The plaintiff recovered judgment in the municipal court of Ashland county. The cause was appropriately carried to the circuit court by appeal under the practice prescribed for appealing from judgments rendered in justices' courts. The circumstances of the case were such under such practice that the cause became pending in the circuit court for a new trial the same as an action originally brought there. At the time stated an action was pending involving a question vital to plaintiff's right to recover in this case. The latter was accordingly held in abeyance for nearly two years awaiting the outcome of the controversy in the former. The question was finally settled in plaintiff's favor. Thereupon defendant tendered plaintiff the full amount of the judgment appealed from with costs to date, except no amount was included for, nor was there any offer to pay, statute costs in addition to disbursements. Plaintiff refused to accept the tender because $10 was not included for statute costs under sec. 2925, Stats. (1898). Thereupon defendant paid the amount tendered into court for plaintiff, fully complying with sec. 4266, if plaintiff was not entitled to $10 costs under sec. 2925, and by supplemental answer pleaded the tender as a defense to further prosecuting the action. The cause was tried on the issues thus raised. It was decided in defendant's favor and judgment was rendered accordingly.

The cause was submitted for the appellant on the brief of *D. E. Roberts* and *Michael S. Bright,* attorneys, and *Walter S. Whiton,* of counsel, and for the respondent on that of *Luse, Powell & Luse.*

MARSHALL, J. The ideas upon which the judgment complained of are grounded are: *first,* sec. 4266, Stats. (1898), allows a defendant, circumstanced as respondent was at the time it made the tender in question, to secure immunity from

costs by tendering the whole sum due upon the contract with legal costs of suit incurred up to the time thereof, such tender to be made to the plaintiff or his attorney, and, if not accepted, to plead the fact by answer in like manner as if it had been made before the commencement of the action, and paying into court the amount offered; *second,* costs in cases appealed under the practice for appealing from judgments rendered in justice's court are limited by sec. 2925, providing that (*a*) costs shall go to respondent in case of the judgment being affirmed or the appeal dismissed, where there is no new trial; (*b*) costs shall go to appellant in case of the judgment being reversed where there is no new trial; (*c*) costs shall go, fully or partially, to appellant in the discretion of the court where there is no new trial and the judgment is reversed in part and affirmed in part; (*d*) costs shall go to the successful party where there is a new trial, provided if the appeal be from a judgment in favor of appellant he shall have costs only in case "he shall obtain a more favorable judgment," and otherwise respondent shall have costs; (*e*) "In all such cases full costs shall be ten dollars and all disbursements made for state tax, return of the justice, and officers' and witnesses' fees, together with all costs and fees by law taxable in the justice's court in such action."

It was successfully contended below that, under the provision referred to, in no event are costs allowable to a plaintiff of the kind ordinarily denominated statute costs,—those which are supposed to repair plaintiff's damages for outlays for services of counsel, and covered by the fixed sum of $10 for full costs in that regard,—or perhaps at all, unless there is either an affirmance of the judgment appealed from or a dismissal of the appeal, where there is no new trial, or plaintiff is successful upon such a trial.

So it will be seen that the result of the decision complained of is this: A plaintiff may obtain judgment in justice's court on contract, the defendant appeal to the circuit court, in such

circumstances that the case will there stand for a new trial the same as if commenced in such court; he may cause the case to be delayed on appeal, or it may be delayed without fault of his adversary, from term to term, for one or two years and then, after such prejudice to the rights of the latter, appellant can escape from liability to repair the damages inflicted upon him in the way of counsel fees, and perhaps costs in general upon the contract sued on, by tendering the amount due.

Looking at the matter in another aspect, if the defendant in an action on contract in justice's court obtains judgment and plaintiff appeals, paying the justice's fees and the costs required in such cases, and the case remains pending in circuit court for several terms, the plaintiff being put to considerable expense for counsel fees and other matters in the meantime, the defendant can then escape all liability for costs by tendering to the plaintiff the amount due on the contract.

Looking at the matter from another viewpoint, a plaintiff may obtain judgment in justice's court with costs, including $10 attorney's fees, be compelled to have his judgment superseded by an appeal to the circuit court, be delayed there for several terms of court at considerable expense, as before, and then be compelled to walk out of court with only the amount due on the contract, if the defendant elects before the cause is actually called for trial, to pay such amount and makes the proper tender.

True, the respondent in this case tendered, in addition to the amount due upon the contract, the costs included in the justice's judgment not theretofore paid. But we must view the appeal in the light of the consequences which would result from adopting the rule contended for.

The idea is that no costs of suit can be incurred within the meaning of sec. 4266, under which the tender was made, except such as are taxable, and that none are taxable in the situations mentioned in sec. 2925 till there is a judgment of some sort.

It must be remembered that the costs incurred in justice's court and forming part of a judgment appealed from as to a case for disposition on the appeal by trial *de novo* are only recoverable by being allowed as costs in the circuit court in making up the cost bill there. They are not separable in that respect from disbursements in the appellate court nor from statute costs in such court, taxable, if at all, at $10. All are joined together.

In view of the foregoing no discussion is needed to show that such a construction of the statute as the one contended for would lead to very unreasonable results.

We must view the question for decision by the spirit of our Code, that if one is compelled by wrongful conduct of another to resort to judicial proceedings for redress and thereby incurs expense for counsel and other reasonable outlays his remedial right shall include that of compensation in some measure at least for his loss in respect to the expense for counsel as well as in respect to disbursements for services of officers.

We also view the question under discussion not losing sight of the fact,—conceded by counsel for respondent,—that upon a case reaching the circuit court in the circumstances of this one, the action, to all intents and purposes, has the same status as one originally commenced in such court (sec. 3768, Stats. 1898), and that variances from the general scheme as to recoverable costs are pointed out in the special statute (sec. 2925).

The general language respecting costs in circuit court is, perhaps, broad enough to include such an action as this in the absence of some clear indication to the contrary in connection with such language, or elsewhere, in the written law.

With the foregoing in mind we turn to the provisions on the subject of costs in circuit court for a more particular examination. Ch. 129 of the Statutes covers the subject. Sec. 2918, Stats. (1898), provides that "Costs shall be al-

lowed of course to the plaintiff in an action in the circuit court upon a recovery in" either of seven specified classes of cases, "except when otherwise specially provided for by law," one being "in actions of which a justice's court has no jurisdiction." Perhaps that would, ordinarily, be taken as referring only to actions of the nature specified commenced in the circuit court, but, as suggested, it is broad enough in its letter to cover others. Evidently, seemingly, the section was intended to afford costs in all cases of plaintiff recovering in the circuit court not otherwise elsewhere provided for or prohibited.

Sec. 2921 specifies, in general, the items of recoverable costs including some ordinarily necessary in the trial of such actions as are specified in the section devoted specially to costs in cases appealed from justices' courts. If the latter be strictly construed, then a successful party in an action appealed from justice's court might have to bear the loss of a considerable expenditure in addition to that for counsel, which would not be the case if the action were originally commenced, and legitimately commenceable, in circuit court.

If sec. 2925 were framed with the thought of harmonizing it with the general section, as doubtless is the fact, its purpose was to allow costs to the prevailing party in all cases not otherwise provided for and except as limited therein, where such party's recovery has been prejudicially postponed by his adversary. It first provides, as has been indicated, for costs where the judgment below is either affirmed or reversed without a new trial or the appeal is dismissed. Perhaps in general that applies particularly to cases not triable *de novo* as a matter of right in the appellate court, but it is not confined to that field.

It should be noted that the first clause of sec. 2925 does not say, where the action is not triable anew in the appellate court, but "where there is no new trial in the appellate court." We think counsel for respondent are in error in their contention that it only applies to cases where the appeal is not triable

anew in the circuit court and the judgment appealed from is affirmed or reversed according to the appellate court's determination of the right of the matter upon a review of the record. It should be more liberally construed. So construed, an affirmance or reversal by stipulation in an action triable anew at the circuit, or resulting from a submission of the cause upon the record without trial or in any other of several ways which might be mentioned, would be within it.

The idea that the statute is to be applied literally, or strictly, against the right to recover costs, precluding any recovery thereof without a new trial except in case of a formal judgment of affirmance or reversal, or a dismissal of the appeal or judgment following a trial, was repudiated in *Miltimore v. Hoffman,* 125 Wis. 558, 104 N. W. 841. It was there held that a dismissal for want of jurisdiction of the justice involves a reversal within the meaning of the statute.

By the reasoning in *Miltimore v. Hoffman,* it would seem that the very act, as in this case, of paying into court for plaintiff the full amount of his recovery below with or without the disbursements incurred by him up to the date of such payment, is substantially a consent to affirmance of the judgment so far as necessary to protection of plaintiff's rights. Further, it would seem that the court's recognition in such circumstances of the right of the justice's judgment and refusal to pass upon the case as involving any controversy on the merits, is as well within the spirit of the statute calling for an affirmance as a condition precedent to the allowance of costs as the dismissal in the case cited was within such spirit calling for a reversal as a condition precedent to the allowance of costs.

Further it would seem to logically follow that the appellant was entitled to $10 costs in addition to the sum tendered, if costs, ordinarily called statute costs, would have been allowable to him under the circumstances if the action had been one originally commenced in the circuit court.

Note particularly that sec. 4266 requires the sum offered to

be the amount due upon the contract "with all costs of suit incurred." The term "all costs of suit" generally includes such charges as the successful party is permitted to make against his adversary, composing the attorney's fee bill in ordinary actions and which are prescribed at $10 without any itemization, in cases appealed from justices' courts. Is it not quite clear that the idea of the statute is that when a plaintiff is compelled, as in this case, to stand as a demandant for redress in the circuit court, statute costs are incurred by him contingent upon the right of the matter being in his favor, liquidated at $10, no more and no less, regardless of the actual amount of his expenditures in the field covered by such costs? Are not the expenditures or liabilities incurred on account of which the $10 is allowable "costs of suit incurred" as clearly as expenditures and liabilities for officers' fees? If not, why not? Counsel for respondent do not satisfactorily explain that.

Counsel argues at one point with apparent confidence, that "costs of suit incurred" within the meaning of the statute are only "items of expenditure made or incurred," or in other words such expenses as are commonly denominated "disbursements." We do not gather any such idea from the letter or spirit of the statute. Expenditures for services of the clerk or sheriff or witnesses are no more sacred and no more "costs of suit incurred" than expenditures for counsel. No one would claim, we apprehend, that a tender could be successfully made under sec. 4266 in an action commenced in circuit court without including taxable attorney's fees, or an offer to pay the same when duly ascertained.

It was early suggested in New York, in respect to administering a similar statute, that the tender should be with costs of the action up to the time of making it, but that since the amount required to pay the costs is not ordinarily ascertainable without some delay, an offer to pay the costs as soon as duly ascertained would be held a substantial compliance with

the statute. 2 Tillinghast & Shearm. N. Y. Prac. 307. It was later so held. 2 Wait, Prac. (6th ed.) 583; *Slack v. Brown,* 13 Wend. 390.

The New York statute requires the tender to include "the costs of the suit or proceeding" up to the time of the tender. That it means the same as the words of our statute, "costs of suit incurred up to the time," is quite evident. The parent statute clearly indicates that it was intended to include the whole costs of suit on the part of the one tendered to during the particular period referred to, taxable attorney's fees as well as disbursements.

Counsel cite *Huebl v. Scollard,* 142 Wis. 589, 126 N. W. 12, to the point that the right to costs does not accrue until judgment. That case is merely to the effect that the right to costs does not become vested by the commencement of a suit so that it cannot be divested by repeal, before judgment, of the statute affording the right. It by no means was intended to hold that a defendant may escape liability for any costs by making a tender before judgment. The case has no application to the situation before us. Neither has *Two Rivers Mfg. Co. v. Beyer,* 74 Wis. 210, 42 N. W. 232. The idea there is that a plaintiff is not entitled to costs till he actually prevails in a case where the court has jurisdiction to render a judgment; that if the plaintiff accepts satisfaction of his claim pending the action, he cannot insist upon judgment for costs and pursue the action for the purpose of recovering them; that the proper way to preserve his right to costs is to refuse to accept the money in satisfaction of his claim without the costs being tendered as well as the amount of such claim. It will readily be seen that the case does not apply here. Appellant did not accept the money tendered in satisfaction of his claim. He refused it because the full "costs incurred" up to the date of the tender were not offered. He stood upon his statutory right to "costs incurred" including the $10 stated. In our judgment the trial court erred in not allow-

ing him judgment because of respondent's refusal to pay such costs.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings according to law.

JACOB JOHNSON FISH COMPANY, Respondent, vs. WACHSMUTH LUMBER COMPANY, Appellant.

October 28—November 15, 1910.

Negligence: Fires: Destruction of adjoining property: Evidence: Defective spark-arrester: Questions for jury: Insufficient verdict.

1. In an action for destruction of plaintiff's property by fire originating on defendant's premises, assuming that defendant's refuse burner was equipped with reasonably safe appliances, it is *doubted* whether a finding by the jury that defendant was negligent in operating its sawmill and refuse burner at the time in question would be sustained by the evidence, which tended to show, among other things, that a high wind was blowing, that there had been a long period of drought, that there was a large quantity of lumber and of inflammable refuse on defendant's premises, separated however from the refuse burner by a clear space of two hundred feet, and that fires in the lumber yard were frequently started by sparks from the refuse burner.
2. The question whether the spark-arrester on defendant's refuse burner was defective should, upon the evidence, have been submitted to the jury.
3. A question submitted to the jury as to whether defendant was negligent "in failing to provide suitable means and appliances to prevent and put out fires" is *held* broad enough in its terms to include the inquiry whether a proper spark-arrester had been provided, although, after the question had been answered in the negative, the trial court stated that it had not been understood as referring to the spark-arrester and that the undisputed evidence was that the spark-arrester was defective.
4. Where it cannot be ascertained from the whole record what issues may have been considered by the jury in answering questions of a special verdict, such verdict is too uncertain, indefinite, and insufficient to sustain a judgment.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action to recover the value of the plaintiff's property which was destroyed by a fire communicated from the lumber yard of the defendant. The plaintiff claims that the fire originated through the defendant's negligence, and that defendant negligently permitted it to escape from its premises and spread to the plaintiff's property.

The defendant owned and operated a saw and planing mill at Bayfield and had a lumber yard on adjacent premises on which was stored a large quantity of lumber. A large quantity of slabs, edgings, sawdust, and waste material of an inflammable nature was strewn about the premises outside of an area of 200 feet around a refuse burner attached to the sawmill. The plaintiff was the owner of a fish house and docks with personal property therein, adjoining the defendant's lumber yard on the east. This property was destroyed by fire which on the afternoon of September 5, 1908, originated in the defendant's lumber yard and spread through the lumber piles and thence to the property of the plaintiff, destroying it. The defendant operated a refuse burner in connection with and near its sawmill, and the complaint alleges that in the light of the hazard and danger on the day in question the refuse burner was negligently operated; that an extraordinarily high, strong wind blowing from the southwest carried sparks and live coals over the mill yard, and, the season having been very dry for two months before the fire, the lumber and refuse on defendant's premises had become highly inflammable and unusual dangers from fire to adjoining property were thus created. It is further alleged that the refuse burner operated by the defendant was defective in construction, especially that the spark-arrester thereon was not reasonably safe, and also that the defendant failed to provide ample apparatus with which to extinguish fires which might start in its lumber yard or in waste materials in its mill yard, and to

prevent the escape and spread of such fire to adjoining property.

The refuse burner was operated in a clear space of about 200 feet about the burner. It had a spark-arrester with a mesh three sixteenths of an inch in diameter, which had been put on about nine months before the fire. There was evidence tending to show that the insurance companies required a clear space about a refuse burner, and that a clear space of about 200 feet met their requirements. There was evidence tending to show that on the day in question a very high wind was blowing, that it moderated somewhat about noon, but soon increased again, and that in the afternoon it was very strong for over an hour immediately preceding the fire. There was also evidence supporting the claim that fires in the lumber yard from sparks from the refuse burner were of frequent occurrence; that on the afternoon of the day preceding the fire which destroyed plaintiff's property one of the employees of the defendant had assisted in extinguishing some thirty-six fires which were started in the lumber yard by sparks from the refuse burner, and that on the day of the fire some twenty-odd fires in the yards had been extinguished. There was evidence tending to show that the spark-arrester on the refuse burner had a screen of a somewhat smaller mesh than was ordinarily used, that it was examined from the ground after the fire and no defect was found in it, and that the examination was so made that defects would have been discovered. Whether the fire in question was started by sparks or live coals which escaped from the refuse burner is contested.

The plaintiff's counsel requested that the following questions be inserted in the special verdict:

"1. Was it negligence on the part of the defendant to run its sawmill and use its refuse burner to burn waste matter which came therefrom on the 5th day of September, 1908?

"2. Did defendant exercise ordinary care in equipping its

refuse burner with, and maintaining, a suitable spark-arrester to prevent the escape of fire therefrom?

"3. Did defendant exercise ordinary care in providing and maintaining suitable means to prevent the escape of fire from its mill yard to plaintiff's property?

"4. If you answer question No. 1 by 'Yes' and questions No. 2 and 3 by 'No,' then were the facts found by such three answers the proximate cause of the burning and destruction of plaintiff's property?

"5. If you answer 'No' to question No. 4, were the facts found by your answers to one or two of said questions No. 1, 2, and 3, the proximate cause of the burning and destruction of plaintiff's property, and if so, which of them?

"6. If the court shall be of the opinion that the plaintiff is entitled to judgment, at what sum do you assess its damages?"

The court submitted to the jury the questions of the verdict which was returned, which was as follows:

"(1) Was there a want of ordinary care by defendant, *Wachsmuth Lumber Company,* in running its sawmill with the refuse burner attached, equipped, and surrounded as it was immediately before and at the time of said fire? *A.* Yes.

"(2) Was there a want of ordinary care by defendant in running said mill with the refuse burner and spark-arrester attached, equipped, and surrounded as aforesaid, at said times? *A.* Yes.

"(3) Was there a want of ordinary care by defendant in failing to provide suitable means and appliances to prevent and put out fires at said times? *A.* No.

"(4) If you answer questions 1, 2, and 3 'Yes,' were each and all of said acts of negligence the proximate cause of the destroying of plaintiff *Jacob Johnson Fish Company's* said property? *A.* No.

"(5) If you do not answer question 4 'Yes,' then write in the numbers of such acts of negligence only as you find, if any, were the proximate cause of the destruction of said property? *A.* One and two. Question (1) and question (2).

"(6) Was plaintiff guilty of any want of ordinary care which in any manner contributed proximately to his said damages? *A.* No.

"(7) What sum was plaintiff damaged by the destruction of plaintiff's property? *A.* Seven thousand dollars ($7,000)."

The court refused to change, as requested by the defendant, the answers to certain questions of the special verdict. Plaintiff's motion to change the amount of damages assessed from $7,000 to $10,000, on the ground that the undisputed evidence showed that such were the damages and that the jury had deducted the insurance obtained by the plaintiff from the actual value of the property destroyed in assessing the damages, was granted; and in granting plaintiff's motion for judgment on the verdict, when so corrected, the court found that the undisputed evidence showed that the spark-arrester on the defendant's refuse burner was defective and that its defective condition, by allowing sparks and coals to escape from the burner, especially in a season of drought and during high winds, greatly endangered property adjoining the defendant's mill site. The court also stated that the court was satisfied that the jury and counsel understood that question No. 3 referred to the means and appliances provided by the defendant for extinguishing fires and not to the spark-arrester or refuse burner. This is an appeal from the judgment so awarded.

R. Sleight, for the appellant.

William F. Shea, for the respondent.

SIEBECKER, J. The defendant contends that, assuming that the refuse burner was equipped with reasonably safe appliances, the court erred in holding that the evidence was sufficient to show that the defendant was guilty of a want of ordinary care in running its sawmill and refuse burner on the day and at the time of the fire under the conditions then existing respecting the danger from fire on account of the inflammable material on its premises and the liability of its being ignited by sparks and of the fire being communicated by the high wind to the property of others in the immediate

vicinity. The facts disclosed by the evidence on this subject leave it uncertain whether the facts and circumstances of the case are such that they will sustain such a finding by the jury. Since a new trial must be awarded and we cannot now know what the particulars of the evidence may be upon the retrial of the case as to this claim of negligence, we do not regard it necessary to finally decide the case upon this issue, but we deem it appropriate to say that it is doubtful whether the evidence in the record tends to show that the defendant was guilty of a want of ordinary care in operating its sawmill and refuse burner, if provided with reasonably safe appliances, under the surrounding conditions as shown by the record.

The court in its order for judgment declared that it appeared from the undisputed evidence that the plaintiff's damages were in excess of $10,000; that the spark-arrester of defendant's refuse burner was defective; and that question No. 3 of the verdict was understood by the court, the jury, and counsel not to have any reference to the spark-arrester. There is evidence to the effect that the spark-arrester was equipped with a new three-sixteenths inch mesh of proper material, that it would not become defective from use in the length of time it had been used, and that several witnesses examined it immediately after the fire and found it in good condition. This evidence was rebutted by opinion evidence to the effect that sparks emitted from such an arrester in good condition of repair would not live to cause a fire beyond a 200-foot area around the refuse burner. It also appears that many fires were set outside of this area during the preceding day and on the day of the fire, which may be found to have been caused by sparks emitted from this spark-arrester. This conflicting state of the evidence made the inquiry regarding the alleged defect of the spark-arrester an appropriate one for the jury and it should have been submitted to them for determination.

An examination of the verdict discloses uncertainties re-

garding this inquiry and its submission to the jury. The instructions given to the jury in connection with questions 1 and 2 gave them no directions that this inquiry, as to the proper condition of the spark-arrester, was included in the questions submitted to them. Question 3, as framed, contains language which in its natural meaning is broad enough to embrace the inquiry as to whether the defendant provided a proper and suitable spark-arrester, but the instructions thereon do not refer to such an inquiry, and the declaration of the court that it was defective as matter of law repudiates the idea that this phase of the defendant's negligence was passed on by the jury. From the whole record we cannot ascertain what issues may have been considered by the jury in framing their answers to the questions in the verdict, and this renders it too uncertain, indefinite, and insufficient to sustain the judgment awarded.

We are also of the opinion that question 3 is not restricted by its phraseology to the means and appliances provided for extinguishing fires in the mill yard after ignition of the inflammable materials, and to prevent escape thereof to adjoining property.

Since there must be a new trial ordered on account of the errors noted, and since the other questions raised will probably not arise upon a new trial of the action, we deem it unnecessary to consider them on this appeal.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

HANKWITZ, Respondent, vs. BARRETT, Appellant.

October 29—November 15, 1910.

Contracts: Validity: Oral agreement to repurchase stock: Statute of frauds: Parol evidence affecting writings: Action by assignee: "Real party in interest:" Examination of witnesses: Leading questions: Evidence: Relevancy: Appeal: Costs: Supplemental case.

1. Where corporate stock is sold, paid for, and delivered pursuant to a transaction wherein the vendor, as a condition of the sale, orally agrees to repurchase it at the option of the buyer, the whole constitutes one original contract, which is sufficiently performed to take it out of the statute of frauds (sec. 2308, Stats. 1898).
2. The fact that the buyer of corporate stock signed a written subscription therefor when or before the sale was made, does not preclude proof of an oral agreement by the vendor to repurchase. The subscription being a unilateral contract containing the promise of one party only, the promise of the other may be shown by parol, where it does not contradict the writing.
3. An assignment of a claim, absolute in form, authorizes the assignee to sue thereon as the real party in interest, notwithstanding a collateral agreement whereby he undertakes to pay over to the assignor the amount collected less a proportionate share of the costs of collection.
4. The allowance of leading questions is a matter largely in the discretion of the court, and the exercise of that discretion will not be disturbed except where it is clearly abused. Where the question merely embodies a summary of evidence before given by the witness, its allowance is not error.
5. In an action upon a contract to repurchase certain corporate stock sold to plaintiff it was not error to exclude a question asked of defendant as to whether it was his own or the company's stock he was selling, since this did not call for anything which was said or done between the parties, but merely for the conclusion of the witness as to a fact not in issue.
6. Respondent having printed a supplemental case which contained matter not found in the bill of exceptions, other matter relating to questions not raised by the appeal, and testimony in the form of question and answer which had been correctly given in narrative form in the original case, costs for printing such supplemental case are disallowed.

APPEAL from a judgment of the superior court of Lincoln county: MARTIN L. LUECK, Judge. *Affirmed.*

Action to recover the amount paid for certain stock in the Tunnel Hill Mining Company sold by the defendant to plaintiff and his assignors under an agreement by the defendant to take back the stock and return the consideration paid for it if the purchaser at any time became dissatisfied therewith. The defendant in his answer admitted that he sold the stock, but denied that he agreed to purchase the same back, and alleged by way of further defense as to each claim assigned to plaintiff that the latter was not in fact the real party in interest and had no right to maintain the action. The assignments to plaintiff were in form as follows:

"For a valuable consideration duly received I do hereby assign, transfer and set over unto *Carl F. Hankwitz,* of Merrill, Wisconsin, all claims, demands, rights of action and causes of action I may have against *James A. Barrett* of the same place arising or growing out of the contract between myself and him whereby I purchased certain stock in the Tunnel Hill Mining Company, and arising and growing out of any and all transactions, representations, fraud or deceit, if any there be committed by the said *Barrett* in procuring the said contract or purchase, and do hereby authorize and empower the said *Carl F. Hankwitz* to institute and maintain any and all actions or proceedings at law or equity to enforce such rights and causes of action in the same manner and to the same extent that I might."

Each assignor also made an agreement with the plaintiff in the following form:

"Agreement entered into by and between [name of assignor], party of the first part, of Merrill, Wisconsin, and *Carl F. Hankwitz,* party of the second part, of the same place, witnesseth: Whereas the party of the first part has this day assigned and transferred to the party of the second part certain causes of action against *James A. Barrett,* of Merrill, Wisconsin, now, therefore, the party of the second part hereby agrees to institute and maintain such an action or ac-

tions as are necessary to enforce said claim or claims. The first party agrees to pay such proportion of the expense of such action as the amount paid by the first party for stock in the Tunnel Hill Mining Company shall bear to the total amount paid by all assignors for similar stock who shall have assigned their claims to said *Hankwitz* for the purpose of having them sued upon in the same action, the intention being that the party of the first part and the said *Hankwitz* and all other persons who shall have assigned their causes of action to the said *Hankwitz* shall reimburse said *Hankwitz* for all expenses of said action in just such proportion as the amount paid by each and all of them for their stock shall bear to the total amount. The party of the second part agrees to pay over to the party of the first part all amounts collected by him on the claim assigned by the first party to the second party less the first party's just share of the expenses of collection."

[Signatures of parties.]

The subscription card, referred to hereinafter in the verdict, reads as follows:

"Number of shares, . . . I hereby subscribe and agree to pay for . . . shares of stock in the Tunnel Hill Mining Company. The capital stock of said corporation to be $85,000, and to consist of 85,000 shares, each of the par value of One Dollar, nonassessable."

The jury found as to each purchaser (1) that the defendant in negotiating the sale of the stock did promise to take the same back and return the consideration paid therefor if the purchaser at any time became dissatisfied therewith; (2) that the purchaser relied upon said promise; (3) that from the acts and representations of the defendant the purchaser understood that defendant sold his own stock; (4) that the purchaser did not, at or before the time of paying the purchase price of said stock, sign the subscription card which purports to bear his name; and (5) that a tender of the stock to defendant and a demand for a return of the consideration was made by plaintiff before the commencement of the action. Upon such verdict the court entered judgment in favor of the

plaintiff for the total consideration paid by him and his assignors for the stock, amounting to $4,400, and the defendant appealed.

For the appellant there was a brief by *John Van Hecke,* attorney, and *Geo. L. Williams,* of counsel, and oral argument by *Mr. Van Hecke.*

For the respondent there was a brief by *Smart, Van Doren & Curtis,* attorneys, and *F. J. Smith,* of counsel, and oral argument by *E. M. Smart.*

VINJE, J. 1. The proposition advanced by the defendant that the agreement to repurchase the stock, if any was made, constituted a separate contract and was void under sec. 2308, Stats. (1898), on the ground that it rested in parol and there had been no sufficient part performance to take it out of the statute, cannot be sustained. It was held in *Vohland v. Gelhaar,* 136 Wis. 75, 116 N. W. 869, that where stock is sold, paid for, and delivered pursuant to a transaction wherein the vendor, as a condition of the sale, agrees to repurchase it at the option of the buyer, the whole constitutes but an entire original contract that is sufficiently performed to take it out of the statute.

2. It is claimed that the finding of the jury that the subscription cards were not signed by the purchasers at or before the sale of the stock is not sustained by the evidence. As to one purchaser it was admitted that he signed no card. The evidence was clear and convincing as to some of the others that they did not sign any, and as to the balance there was such a conflict that the jury well might find either way. Upon such state of the evidence this court will not disturb the finding. But even if it were admitted that each purchaser signed the subscription card at or before the sale was made, such fact would not preclude oral testimony to prove that defendant agreed to repurchase; for it would in no wise vary or contradict the writing. Moreover, the subscription card is a

unilateral contract. It contains the promise of one party only. In such case the promise or agreement of the other may be shown by parol where it does not contradict the contract. *Smith v. Coleman,* 77 Wis. 343, 46 N. W. 664; *Caldwell v. Perkins,* 93 Wis. 89, 94, 67 N. W. 29. So, in any view of the case, the court did not err in receiving parol testimony to prove the promise to repurchase.

3. The claim is made that the assignments to, and agreements with, the plaintiff, set out in the statement of facts, show that he is not the real party in interest and, therefore, has no right to maintain the action. It is evident from a mere inspection of the assignments and agreements that the plaintiff was at least an assignee for collection. As such he was entitled to maintain the action. *Wooliscroft v. Norton,* 15 Wis. 198; *Gates v. N. P. R. Co.* 64 Wis. 64, 24 N. W. 494. But the assignments are absolute in form and vest the entire apparent legal title in the assignee. This is a sufficient protection to the defendant. He cannot be subjected to a second action by the assignor or any one, and is in no position to question the effect or validity of collateral agreements to account for the proceeds to the assignor or to apply them as directed by him. Such collateral agreements do not render him any the less the real party in interest. Pomeroy, Code Rem. (4th ed.) § 70; *Crowns v. Forest L. Co.* 99 Wis. 103, 74 N. W. 546; *Chase v. Dodge,* 111 Wis. 70, 86 N. W. 548; *Brossard v. Williams,* 114 Wis. 89, 89 N. W. 832. In *Robbins v. Deverill,* 20 Wis. 142, Dixon, C. J., was of the opinion that an assignment, though absolute in form, did not constitute the assignee the real party in interest where it appeared that he held it in trust for the firm of which he was a member. It was not, however, necessary to decide the question in that case, and the court in a separate opinion says:

"We agree with the chief justice in affirming the judgment, but not in all his reasoning. We express no opinion as to whether the plaintiff is the trustee of an express trust within

the statute, or is the real party in interest, so as to sue in his own name."

4. A number of errors relating to rulings upon the admission of evidence are relied upon to reverse the judgment. In view of the decision on the questions already discussed, only two need consideration. The witness Juve was permitted to answer this question: "As I understand it, when you say you think it is your signature you base it simply upon the resemblance of the handwriting?" This was objected to as leading and improper. The witness had been examined at length as to whether or not the name upon the subscription card was his signature, and this question merely embodied a summary of a portion of his testimony on the subject. Under such circumstances it was not error to permit it to be answered,—certainly not prejudicial error. Besides, the trial court is vested with a large discretion as to when it is proper to allow leading questions, and the exercise of that discretion will not be disturbed except when it is clearly abused.

The defendant was not permitted to answer either of the following questions: "In fact, whose stock were you selling?" "State what the fact is, *Mr. Barrett,* as to whether you were selling your own stock or the stock of the company." This is assigned as error. Neither question called for what was said or done during the transaction or conversation when the sale was made. Both merely called for the conclusion of the witness as to a fact not in issue, and the court properly excluded the answers.

5. The respondent printed a supplemental case of twenty-nine pages. This was entirely unnecessary. Some of the matter contained in it is not found in the bill of exceptions at all. Other portions relate to questions not raised by the appeal, and still others merely contain the testimony in the form of questions and answers instead of in the narrative form in which it is correctly given in the original case. Respondent will therefore be allowed no costs for printing the supplemental case.

By the Court.—Judgment affirmed.

WEIK, Appellant, vs. CITY OF WAUSAU and others, Respondents.

October 29—November 15, 1910.

Cities: Funds "appropriated by law" to special purposes: Unlawful diversion: Injunction.

1. Moneys raised by taxation for a specific purpose constitute a fund "appropriated by law" for that special purpose, within the meaning of sec. 925—122, Stats. (1898), and the council of a city of the third class, operating under the general charter law, cannot lawfully transfer such fund even temporarily to the general fund or any other city fund.
2. Irrespective of special statutory provisions, a fund raised by a city for a special purpose is a trust fund, and equity will in a proper case interfere to prevent its diversion.

APPEAL from orders of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Reversed.*

This is a taxpayer's action in equity to perpetually enjoin the city officers of the city of *Wausau* from diverting the city hall fund of the city to other uses. A general demurrer to the complaint was sustained and a temporary injunctional order was denied, and the plaintiff appeals from both orders.

The complaint charges in substance that prior to May, 1906, the city of *Wausau* raised by taxation $40,000 for the purpose of building a city hall, and that a site for the city hall was donated to the city at about the same time; that at several times during the years 1906 and 1907 the city treasurer, by direction of the city council, diverted large amounts from said fund and used the same for other city purposes and replaced the amounts so borrowed from the fund at the time of the ensuing tax levy; that in the year 1909 the treasurer, by direction of the council, again diverted $10,000 from the fund to the school fund of the city and $4,000 to the bridge fund of the city, and that on September 16, 1909, the council directed that $6,000 be transferred from such fund to the general fund of the city. The plaintiff, who was a taxpayer of the city, prayed that the city officers be enjoined from di-

verting the fund and be required to restore the same so far as it had already been diverted. The borrowing of the fund substantially as alleged and the intention to make further loans therefrom was admitted by the defendant, and the claim was made that such borrowing was entirely legal.

The cause was submitted for the appellant on the briefs of *Regner & Ringle,* and for the respondents on that of *Franklin E. Bump,* city attorney, and *Bump & Manson,* of counsel.

WINSLOW, C. J. The question presented is, Can the city council of a city of the third class, operating under the general city charter law, lawfully transfer moneys from a city fund which have been levied and raised for one specific purpose, to the general fund or to some other city fund, with intent to repay the same when the next tax levy is collected?

The argument in favor of the proposition is that the council by sec. 925—52, Stats. (1898), is given "the management and control of the finances" of the city, and that although sec. 925—122 forbids the treasurer from paying out any funds in his hands "appropriated by law" for any special purpose except for such purpose, still this prohibition only applies to the funds named in sec. 925—121, namely, school funds, funds set apart to pay the public debt, and funds collected on special assessments. In other words, the contention is that money raised by taxation to build a city hall, or to maintain a fire department or a police department, or to meet any other specific city charge, may be temporarily used by the council for other purposes because it is not "appropriated by law" to the special purpose, but is only appropriated by act of the council.

This view is entirely too narrow a view of the statute. By sec. 925—142*a,* Stats. (1898), it is provided that "the common council shall have power to levy annually such sum or sums of money as may be sufficient for the several purposes for which taxes are authorized to be levied and *to apportion*

the same into such funds for city or ward purposes as they may provide by ordinance or resolution." When this apportionment into funds is made, each fund is undoubtedly as fully "appropriated by law" to its own special purpose as if the appropriation had been made by direct act of the legislature.

Irrespective of the special statutory provisions above cited, this court has held that a fund raised by a city for a special purpose "is a trust fund, and equity will in a proper case interfere to prevent its diversion." *Rice v. Milwaukee,* 100 Wis. 516, 76 N. W. 341; *Oconto City W. S. Co. v. Oconto,* 105 Wis. 76, 80 N. W. 1113.

By ch. 256, Laws of 1899 (sec. 925—130*a,* Stats.: Supp. 1906), cities of the first class are given authority to borrow from one city fund and use the money for other purposes and replace the amount borrowed out of the next tax levy. This provision, however, has no application to cities of the third class, and it only serves to demonstrate that the legislative idea was that no such borrowing could be done without express authority.

By the Court.—Both orders appealed from are reversed, and the action is remanded with directions to overrule the demurrer to the complaint and grant the temporary injunctional order prayed for, and for further proceedings according to law. But one bill of costs to be taxed.

FIRST NATIONAL BANK OF RACINE, Respondent, vs. SCHELLENBERG, Appellant.

October 29—November 15, 1910.

Guaranty: Pleading.

The complaint herein is *held* to state a good cause of action upon a contract of guaranty.

APPEAL from an order of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

Action to recover on guaranty.

The pleader stated facts appropriate to a good cause of action to recover on a contract of guaranty, if the following shows a good contract of that character:

For the purpose of enabling the United States Washing Machine Company, a corporation doing business in this state, to obtain credit at plaintiff's bank, defendant with other stockholders of such corporation, September 30, 1903, in writing expressing a consideration, waiving notice of acceptance of the guaranty by plaintiff or of indebtedness incurred on the faith thereof by said corporation to plaintiff during the life of the guaranty, and signed by defendant, jointly and severally guaranteed the prompt payment at maturity or thereafter of any and all indebtedness either as principal or indorser, due on that day or which might thereafter become due from said corporation to the plaintiff, not exceeding $1,500, with interest at the rate of seven per cent. per annum from maturity until paid, and to pay all costs and expenses incurred in collecting such indebtedness, said guaranty to be continuing, subject only to termination by a written notice received by plaintiff to that effect and satisfaction of all liability thereunder existing at the date of such reception. In reliance on such guaranty plaintiff extended credit to said corporation from time to time, taking its notes on account thereof and allowing renewals of the same, so that, June 9, 1909, such corporation was indebted to plaintiff in the sum of $2,000, for which it then took, relying upon the guaranty, a four months' six per cent. note of such corporation, payable October 9, 1909. Said note became due before the commencement of this action, but no part thereof has been paid though demand therefor has been made.

The defendant demurred to the complaint for insufficiency. The demurrer was overruled and defendant appealed.

For the appellant the cause was submitted on the briefs of *Regner & Ringle.*

For the respondent there was a brief by *Hand & Hand,* and oral argument by *E. B. Hand.*

MARSHALL, J. The foregoing brief statement of the contents of the complaint shows so clearly, by bare inspection, that the facts set forth constitute a good cause of action, it does not seem advisable to do more, in disposing of the appeal, than to state such conclusion and pronounce the proper judgment.

By the Court.—The order is affirmed.

STATE EX REL. HESSEY, Respondent, vs. DANIELS, Town Clerk, Appellant.

October 29—November 15, 1910.

Constitutional law: Taxation: Local self-government: Assessment not complying with law: Reassessment and review by appointees of state tax commission.

1. An act of the legislature will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond reasonable doubt.
2. The legislature has plenary power over the whole subject of taxation, within constitutional limitations.
3. The persons appointed under ch. 259, Laws of 1905, by the state tax commissioners to reassess the property of a particular assessment district, or to review the assessment so made, are not officers in the constitutional sense.
4. Local taxing officers, in performing their respective duties, perform governmental as well as municipal functions; and the state has a vital interest in insisting that its laws pertaining to taxation be honestly and fairly administered, to the end that the burden of taxation may be equitably distributed. Hence the state, in endeavoring to enforce the requirements of the law on that subject, is not acting as a mere interloper, but is performing a duty in which its citizens generally are interested.

5. Whenever local assessors and boards of review act in disregard of their statutory duties the state has power to provide for the appointment of outside agencies to execute the law which is being ignorantly or wantonly violated, or wilfully set at defiance, as the case may be.
6. Since all that the state undertakes to do under ch. 259, Laws of 1905, is to review the work done by the local officers when its proper agencies are satisfied that the law has been violated, that act cannot be declared a violation of sec. 9, art. XIII, Const., on the ground either that it deprives the electors of the local community of the right to choose their taxing officers or that it unlawfully deprives the local officers of the right to exercise their proper functions.

MARSHALL, J., dissents.

APPEAL from an order of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

By ch. 259, Laws of 1905, it is provided that whenever it is made to appear to the state tax commissioners that the assessment of property in any assessment district was not made in substantial compliance with the law, and that the interests of the public would be promoted by a reassessment, such commissioners should have authority to order a reassessment and to name one or more persons who should make the same. It further provided that the commissioners should have authority to appoint a board of review to review the assessment made by its appointees for that purpose. Pursuant to the provisions of this law a majority of the state tax commissioners appointed three persons to review the assessment and equalization made by the assessor and board of review of the town of Iron River in Bayfield county for the year 1909. The town clerk of that town, acting under the advice and direction of the town board, refused to make out a tax roll on the basis of the assessment and equalization made by the appointees of the tax commissioners. An alternative writ of *mandamus* was sued out requiring said town clerk to make out a tax roll for said town and said year on the basis of the reassessment made as aforesaid, or to show cause why he

should not do so. By his return to the writ the town clerk justified his refusal to make out a tax roll in accordance with the reassessment, on the ground that the aforesaid ch. 259, Laws of 1905, was unconstitutional and void, and because the only lawful assessment made in said town in said year was that made by the assessor and board of review duly elected by the electors of the town for that purpose. To this return the relator demurred, which demurrer was sustained, and this appeal is taken from the order sustaining the same.

For the appellant there was a brief by *C. F. Morris* and *Olin & Butler,* and oral argument by *J. M. Olin.* To the point that ch. 259, Laws of 1905, was unconstitutional, they cited, among other authorities, *Lorillard v. Monroe,* 11 N. Y. 392, 394; *People ex rel. Wood v. Draper,* 15 N. Y. 532; *People v. Raymond,* 37 N. Y. 428; *People ex rel. Bolton v. Albertson,* 55 N. Y. 50; *Warner v. People ex rel. Conner,* 2 Denio, 272, 277; *People ex rel. Williamson v. McKinney,* 52 N. Y. 374; *People ex rel. Fowler v. Bull,* 46 N. Y. 57; *People ex rel. Le Roy v. Foley,* 148 N. Y. 677, 682; *Rathbone v. Wirth,* 150 N. Y. 459; *Matter of Brenner,* 170 N. Y. 185; *People ex rel. Metropolitan St. R. Co. v. Tax Comm'rs,* 174 N. Y. 417; *O'Connor v. Fond du Lac,* 109 Wis. 253, 264–68; *Davidson v. Hine,* 151 Mich. 294, 15 L. R. A. N. S. 575, and note; *People ex rel. Le Roy v. Hurlbut,* 24 Mich. 44, 66–68, 87, 90, 95–110; *People ex rel. Hubbard v. Springwells,* 25 Mich. 152, 156; *Davies v. Saginaw,* 89 Mich. 295, 50 N. W. 862; *Ex parte Corliss,* 16 N. Dak. 470, 114 N. W. 962; *State ex rel. Crawford v. Hastings,* 10 Wis. 525; *State ex rel. Kennedy v. Brunst,* 26 Wis. 412, 7 Am. Rep. 84; *Cole v. Black River Falls,* 57 Wis. 110; *State ex rel. Hamilton v. Krez,* 88 Wis. 135; *State ex rel. Williams v. Samuelson,* 131 Wis. 499; *State ex rel. Harley v. Lindemann,* 132 Wis. 47; *State ex rel. Gubbins v. Anson,* 132 Wis. 461.

For the respondent there was a brief by *John Walsh,* attorney, and a separate brief by *Luse, Powell & Luse,* of coun-

sel, and the cause was argued orally by *Mr. Walsh* and *Mr. L. K. Luse.* Among other authorities they cited *State ex rel. Brown Co. v. Myers,* 52 Wis. 628; *State ex rel. Ellis v. Thorne,* 112 Wis. 81; *In re Appointment of Revisor,* 141 Wis. 592; *Zimmer v. Bay Co.* 159 Mich. 213, 123 N. W. 899, 903; *State Tax Comm'rs v. Board of Assessors,* 124 Mich. 491, 83 N. W. 209; Cooley, Taxation, 43; *Strange v. Oconto L. Co.* 136 Wis. 516; *Sprague v. Brown,* 40 Wis. 612; *State ex rel. Williams v. Samuelson,* 131 Wis. 499; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553; *State ex rel. Gubbins v. Anson,* 132 Wis. 461; *Foster v. Rowe,* 128 Wis. 326; *Wallace v. Menasha,* 48 Wis. 79; *Crandon v. Forest Co.* 91 Wis. 239, 244; *Hollman v. Platteville,* 101 Wis. 94, 98; *Lorillard v. Monroe,* 11 N. Y. 392, 396; *Jensen v. Polk Co.* 47 Wis. 298; *People ex rel. Wood v. Draper,* 15 N. Y. 532; *People v. Pinckney,* 32 N. Y. 377, 393, 394.

BARNES, J. Sec. 9 of art. XIII of our state constitution provides that "All city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose."

Acting under the provisions of ch. 259, Laws of 1905, the substance of which will be found in the foregoing statement of facts, the state tax commissioners found that the assessment of the town of Iron River for the year 1909 was not made in substantial compliance with the law, and appointed certain nonresidents of the town to make a new assessment of the property therein, and appointed certain other nonresidents to act as a board of equalization to review such assessment.

The office of town assessor being one which existed at the time the constitution was adopted, it is urged that the law in question violates the provision of the constitution above

quoted, in that it deprives the electors of the town of the right to choose their assessor and board of review and to have them perform their legitimate functions, and this is the sole question raised in this court.

It is elementary law that an act of the legislature will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond reasonable doubt. There is a line of cases so holding, running from *Norton v. Rooker*, 1 Pin. 195, to *McGillivray v. Joint School Dist.* 112 Wis. 354, 359, 88 N. W. 310, and no doubt beyond; and this general doctrine has never been qualified in words. Equally well settled and as oft reiterated is the other rule that "the legislature has plenary power over the whole subject of taxation within constitutional limitations." *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797.

It is conceded that the law we are considering neither deprives nor purports to deprive local communities of the right to elect their assessors and the other officers who constitute the boards of review. It is likewise conceded that the persons appointed by the tax commissioners to make the assessment provided for, as well as persons selected to review it, are not officers. *Hall v. State,* 39 Wis. 79; *Weise v. Milwaukee Co.* 51 Wis. 564, 8 N. W. 295; *State ex rel. Brown Co. v. Myers,* 52 Wis. 628, 632, 9 N. W. 777; *In re Appointment of Revisor,* 141 Wis. 592, 124 N. W. 670. The appointees are selected merely to perform a specific act, and when it is performed their powers and functions cease. So the real question is, Does the act unlawfully deprive the local officers of the right to exercise their functions and the electors of the municipality of the right to choose their agents to do the particular work?

It must be remembered that, so long as the local officers obey the laws of the state, they are not meddled with and their functions are in no way curtailed, and it is only when they violate the law which they are bound to obey that the state

undertakes to interfere. It should also be remembered that assessors in making an assessment, and boards of review in reviewing it, and local treasurers in collecting the taxes levied, perform governmental as well as municipal functions. *Wallace v. Menasha,* 48 Wis. 79, 4 N. W. 101; *Crandon v. Forest Co.* 91 Wis. 239, 64 N. W. 847; *Hollman v. Platteville,* 101 Wis. 94, 76 N. W. 1119. Furthermore, the state has a vital interest in insisting that its laws pertaining to taxation be honestly and fairly administered, to the end that the burden of taxation may be equitably distributed. Taxes are of three general kinds: state, county, and local. While the state and the county may fix a valuation of the taxable property in the smaller political units within their boundaries, different from that found by the local authorities, still, in practice, the local assessment may be a strong determining factor in fixing such a valuation. The matter of discovering personal property, and more particularly that of an intangible nature, must devolve very largely upon the work of the local assessor and board of review. In order to make an equal distribution of county and state taxes it is essential that all taxable property that can be discovered be placed upon the tax rolls and that a uniform basis for valuation be adopted and adhered to. So long as the practice prevails of assessing property in different localities at figures varying from twenty-five to one hundred per cent. or more of its true value, and of doing the same thing locally for that matter, so long are we liable to have gross inequalities in the distribution of the tax burden. So the state in endeavoring to enforce the requirements of the law in regard to the assessment and equalization of property is not acting as a mere interloper, exercising a paternalistic function for the purpose of exploiting its right so to do, but is attempting in good faith to perform a duty in which its citizens generally have something more than a passing interest. All the state has undertaken to do is to review the work done by local officers when its proper agencies are satisfied

that the law has been violated. In such a contingency the law in substance and effect provides for a reassessment of the property of the local municipality.

We fail to see where there is any difference in principle between the law in question and sec. 1077*a* of our statutes, which was in force for many years. That statute provided that a reapportionment of the valuation of the taxable property of the several towns, cities, and villages of any county, as fixed by the county board, might be reviewed by nonresident commissioners appointed by a circuit judge, and a readjustment made in accordance with the facts found. The validity of that law was attacked in this court on three separate occasions and its constitutionality was sustained each time. The first assault was made on the ground that the law violated the provision of the constitution which it is here claimed has been overridden. The cases are *State ex rel. Brown Co. v. Myers,* 52 Wis. 628, 9 N. W. 777; *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797; and *Foster v. Rowe,* 128 Wis. 326, 107 N. W. 635. While we do not wish to be presently understood as giving express sanction to all the reasons stated by the court in support of these decisions, we entertain no doubt that in principle the cases are correctly decided, and we have no hesitancy in holding that, whenever local assessors and boards of review act in disregard of the statutory duties enjoined upon them, the state has the power to provide for the appointment of outside agencies to execute the law which is being ignorantly or wantonly violated, or wilfully set at defiance, as the case may be. It is true that sec. 1077*a* required the commissioners appointed under it to so adjust the valuations made by them that their aggregate should total the aggregate valuation of the entire property of the county as fixed by the county board, but this provision could have no bearing on the constitutionality of the law. It would be just as valid without it as with it.

There is no substantial difference in principle between

ch. 259, Laws of 1905, and sec. 1, ch. 175, Laws of 1850, which has been on our statute books ever since its enactment and now appears as sec. 1152, Stats. (1898). The earlier statute provides that, whenever the electors of a town shall fail to elect taxing officers, the county board may appoint those of an adjoining town to exercise their respective functions in the delinquent town. The constitutionality of this law was sustained in *Strange v. Oconto L. Co.* 136 Wis. 516, 117 N. W. 1023. By ch. 259, Laws of 1905, the legislature has enacted that, when the officers elected fail to perform their functions and duties in accordance with positive law, nonresidents of the town may be appointed to assess and equalize property in a legal manner. One statute provides for a contingency where the electors fail to perform their functions, and the other supplements it by providing for a contingency arising where officers are elected but fail to perform their duties in a lawful way. It is quite apparent that the law under consideration may be well calculated to check grave abuses, and we conclude that it does not trench upon any right guaranteed by the constitution. This conclusion renders it unnecessary to consider other interesting and important questions that were ably presented in the written briefs and in the oral arguments at the bar.

By the Court.—Order affirmed.

The following opinion was filed November 28, 1910:

MARSHALL, J. (*dissenting*). True, a legislative enactment is never to be declared not law if it can be sustained; or as the rule is commonly phrased, a statute should not be held to be unconstitutional unless it clearly appears to be so beyond every reasonable doubt. No principle of law is more essentially elementary than that. In no period of our judicial history has greater dignity been given to it by frequent and emphatic judicial declarations than in recent years. *Bon-*

nett v. Vallier, 136 Wis. 193, 116 N. W. 885; *State ex rel. McGrael v. Phelps,* 144 Wis. ——, 128 N. W. 1041, are good examples.

However, to properly apply the aforesaid rule one must appreciate the significance of the limitation characterized by the word "reasonable." As in case of the degree of certainty of the existence of a fact in a criminal prosecution requisite to warrant a finding in the affirmative, it must be remembered that there is a wide difference between a mere or possible doubt and a reasonable doubt. If we trespass upon the former field the most important function of the court as an instrumentality for the preservation of constitutional liberty will utterly fail of its purpose. Our paramount duty is to support the constitution. Our secondary duty is to give efficiency by judicial administration to acts of the lawmaking power which are law in fact, not merely in form, because not inimical to any constitutional limitation.

So, in dealing with any matter to which the constitution necessarily applies, if a statute, in form at least, and presumably in fact as well, also applies, and there is a clear conflict, the court must decide between them, and as "the constitution is superior to any ordinary act of the legislature, the constitution, and not the ordinary act, must govern the case to which they both apply." Such is the teaching of the early classic in this country, *Marbury v. Madison,* 1 Cranch, 137, which has been sanctified by more than a century of universal adoption and by no jurisdiction more consistently than our own; though it must be confessed that there has not been perfect freedom from lapses here and there, as what we shall say, it is thought, pretty clearly indicates. That there has been such a lapse in this case, I will endeavor to show, the court, of course, not now intending to violate the salutary principle involved. Such lapses are liable to accompany the spirit of the times, as the history of the past will show. Different conditions furnish different viewpoints, and different human

instrumentalities with differently focused mentalities on the particular point see things differently. So that which is involved in mere doubt, or no doubt at all at one time, may by a mere shifting of scenes and instrumentalities, especially in the light of unguarded expressions made in support of some novel and doubtful construction, appear otherwise. Constant progression in that line stimulated by the growing impatience of originators of new schemes, with fundamental restraints, may, in time, greatly or wholly impair the efficiency of any written constitution, as the incessant action of tiny drops of water may wear away the hardest stone.

The situation which leads to my dissent is the natural outgrowth, in my judgment, of such unguarded expressions as occurred in *State ex rel. Brown Co. v. Myers,* 52 Wis. 628, 9 N. W. 777, in supposed necessary support of rather extreme legislation. They were really unnecessary to the decision. Guaranteed local self-government, as the court thought, was not interfered with. The court said:

"An examination of the law in question will show, we think, that it does not . . . interfere with the right of local self-government."

Such being the case, the broad, I think unnecessary, inconsiderate, statement, hereafter quoted,—a statement which I feel sure the court as at present constituted would hesitate, if not refuse, to follow in the ultimate,—was the clearest *obiter.*

The law under consideration in the cited case was the one authorizing county assessment of property for county taxation and distribution of the county apportionment of state taxes, to be corrected as to inequalities. Sec. 1077*a,* Stats. (1898). The law did not contemplate superseding the county assessment by one made by commissioners appointed by the circuit judge, neither by setting aside the regular assessment nor making a new one. The sole function was to act as a sort of appellate body to correct inequalities in the distribution of

the aggregate valuation of all the taxable property of the county between the several subdivisions, adding to some and making equivalent deductions from others, and only to afford that remedy on application of the people of some subdivision deeming themselves aggrieved.

Thus the people as a whole in the exercise of local self-government were left to take the initiative. The function of the commissioners was that of correcting inequalities,—one not theretofore exercised by any tribunal in the particular field. Neither prior to the constitution nor any time subsequently was there an officer or body to deal with that matter. So there was really no room for any very confident claim that the legislation interfered with local self-government guaranteed by the constitution, and the court so held without referring to the subject more than briefly and rather incidentally.

It should be noted that the whole groundwork of the decision in *State ex rel. Brown Co. v. Myers, supra,* was that the function of the board was to correct mistakes or error in the distribution of the assessed valuation of the whole "so as to produce a just relation between all the valuations." Emphasis was significantly given to the fact that it did not authorize "in any instance increase" of "the entire aggregate valuation of the taxable property of the county as fixed by the board." "We can see no constitutional objection," said the court, "to a law which authorizes the appointment of commissioners merely to adjust valuations of real estate between different towns as determined by the county board." This and other indications show that the court did not regard the law as having to do with any official function within the constitutional guaranty of local self-government, because it did not have to do with an original assessment of property at all. So the subject of local self-government received but mere passing attention. So incidental was it that the court went no further than to concede that the claim made that local self-government was secured to the people by the fundamental

law, *"especially in matters of taxation, was in a certain sense sound,"* saying, "there are doubtless limits to the legislative power" in such matters, plainly showing that the definite and certain constitutional reservation of local self-government, as regards all official functions existing before the constitution, as it has been in recent years recognized, was not appreciated. The case, however, as a whole, is convincing, that had the law provided for an actual assessment of property for taxation, entirely superseding the assessment by local officers appointed by local authority, it would not have been sustained.

The foregoing indicates, most clearly, how unguarded and unnecessary was this expression in the case:

"This whole matter is within the control of the legislature, which, doubtless, might abolish the present system and create a state board for the assessment and equalization of the value of taxable property of the state."

That is directly contrary to the concession that local self-government, "especially in matters of taxation, was in a certain sense" secured to the people by the constitution. We are safe in saying that its broad meaning would not be applied by the court today. It could only be justified, if at all, as regards state taxation.

The condition created by the case already discussed was somewhat further complicated, it seems, by the decision in *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797, opinion by the writer, speaking for the court. It was there appreciated, as I remember it, that there were expressions in the earlier case which, broadly taken, could not be sustained. I think now such expression should have been distinctly disapproved. The main ground upon which the law was challenged as unconstitutional, was that it was a delegation of judicial power to a body other than a court. A decision on that in the negative was held to be within the spirit of the previous decision. So there, as before, the question of local self-government was not supposed to be involved. It was thought

by the court, I think,—I know it was by the writer,—that there was but one of two things to do with the unguarded previous declaration of legislative absolutism, either to withdraw it, or repeat it with a restriction which the court previously omitted, probably without any considerate purpose to hold that, in the field of taxation, there are no limits to guard against outside interference with local rights. The latter was adopted, the court fencing about the previous expression by these words of unmistakable import:

"The decision is to the effect that the legislature has plenary power over the whole subject of taxation *within constitutional limitations;*" adding "that it may select the objects of taxation, determine the amount of taxes that shall be levied and the particular purpose or purposes the same shall be devoted to, the manner in which property shall be valued for taxation; that it may establish the necessary taxing districts and provide for the selection of all public agencies for the collection, return, and expenditure of the public revenues."

Respecting this the court remarked, "no reason is perceived why the principle thus broadly stated should be restricted in any degree." That is, as plainly indicated, viewing the language as describing power exercisable "within constitutional limitations."

The unguarded expression in the first case, restricted as it was in the second, would probably not have been efficient to leave a reasonable doubt as to the illegitimacy of the act in question were it not for the fact that the court, on ground not dependable upon such expressions, held that the mere equalization of assessments made by local authority was not a usurpation of a function belonging to such authority. That, it seems, is, in the main, the thing which the court now thinks is so analogous to the subject matter of the legislation in question, that a distinction, on principle, which would make one legitimate and the other not, is not plain beyond a reasonable doubt.

As we have before indicated, the subject of county equal-

ization was not a matter dealt with as a local function independently of the county assessment before the constitution was adopted. Had the act provided for the assessment of the property of the county for taxation instead of mere equalization thereof, not changing the aggregate at all, a far different question would have been presented. I apprehend that this court would now find no serious difficulty, were it not for those decisions, in holding a law providing for the original assessment of property for local taxation by officers appointed by outside authority, to be clearly unconstitutional. Consistency with the logic of the other decisions of this court would make that inevitable.

In *O'Connor v. Fond du Lac,* 109 Wis. 253, 85 N. W. 327, the court met, fully, for the first time, the question of whether the functions of local officers as they existed at the time the constitution was adopted, can be conferred upon similar officers similarly characterized, or by other officers, appointed or elected by foreign authority, and the negative prevailed under sec. 9, art. XIII, of the constitution, providing that:

"All city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose;" and further providing, similarly, as to officers of other subdivisions of the state.

The court, unqualifiedly and most emphatically, adopted the doctrine of the highest court of New York respecting a similar constitutional provision, that the purpose thereof was to preserve local authority to select all officers clothed with the functions of local administration as the same existed at the time of the formation of the constitution; that the thing conserved was more particularly the official function, than the office by any particular name; that the function could not be taken from local authority of selection by conferring it on some newly created officer or board. The New York authori-

ties are very pronounced on this and in the very field we are discussing, and its doctrine is ours both because we took the constitutional provision with a substantially existing construction, later approved by the ultimate court, and because it is right on principle, independently thereof, as this court has iterated and reiterated.

The principle of the *O'Connor Case* was, doubtless, not wholly out of mind when we came to *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797. It in effect overruled the literal sense of the expression in *State ex rel. Brown Co. v. Myers,* 52 Wis. 628, 9 N. W. 777, which we have discussed and rendered it necessary for the purpose of harmony, when the later case was written, that the previously unguarded remarks should be brought within constitutional limitations. Looking backward, it seems that the earlier case should have received much more radical treatment.

Since the *O'Connor Case* was decided the legal question involved has been most thoroughly reconsidered and the previous conclusion affirmed. *State ex rel. Dithmar v. Bunnell,* 131 Wis. 198, 215, 110 N. W. 177; *State ex rel. Harley v. Lindemann,* 132 Wis. 47, 111 N. W. 214; *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475.

In the last case cited the court declared that the New York doctrine, adopted by its court of last resort after the adoption of our constitution, was almost at once after such adoption accepted and approved here and has been steadily adhered to.

The general idea of the doctrine aforesaid, is such that local official functions performed by officers of local selection before the constitution was adopted, cannot be lawfully taken from them and imposed on officers appointed by non-local authority; that the spirit of the constitution is that, as to official functions commonly exercised at the time of the adoption of the constitution, they must, if exercised at all, be so, as to town matters by officers selected by town authority, as to counties by officers selected by county authority, and as to

state matters by officers selected by state authority. No exception is made in such authorities, or in New York, or anywhere else, under any similar constitutional provision, as to officers having to do with the assessment and collection of taxes.

The case of *Foster v. Rowe,* 128 Wis. 326, 107 N. W. 635, adds nothing to the two cases we have discussed on the subject first treated in *State ex rel. Brown Co. v. Myers, supra.* Nothing there said militates against the *O'Connor Case* and *State ex rel. Brown Co. v. Myers, supra,* as modified in spirit thereby.

The idea that the emergency rule, so called, invoked in *Strange v. Oconto L. Co.* 136 Wis. 516, 117 N. W. 1023, to sustain the law of 1850, now sec. 1152, Stats. (1898), applies to the case in hand, is carrying such rule to such an unreasonable extent as to render it invocable to overturn local self-government entirely. With due respect for the judgment of my brethren, I cannot see any analogy at all between that statute and the one in question. The former fits a situation where the locality has voluntarily surrendered its constitutional right of self-government by negligently or contumaciously omitting to elect the instrumentalities to that end. Then the law provides that similar officers from an adjoining locality shall temporarily perform the duties. Here the people of the town did nothing to forfeit their constitutional right. They selected an assessor and elected the officers constituting the board of review. All the machinery for local self-government was provided and all the judicial remedies were invocable to coerce them into doing their duties and remedying their failures, yet this law steps in authorizing state authority, in quite a summary way, to appoint a person, or persons, and by their aid to make an assessment of all the taxable property of the taxing district, regardless of the regular officer or his work. Such person, or persons, are not required to be citizens of the taxing district, or even, expressly,

of the state. The law ignores the whole machinery of the taxing district. It provides that the same foreign authority shall appoint a board of review to pass upon the work of the special assessor or assessors. The members of this board are not required to be citizens of the taxing district or even, expressly, of the state. Thus the statute contemplates an entire displacement of the local machinery while such machinery is in existence and competent to act. Is not this statement sufficient to show that the law providing for an assessor where the taxing district neglects or refuses to elect one, has no similarity to the one in question whatever? So, as we have seen, the two statutes and decisions thereunder, which form the basis of the court's decision, in that they at least create reasonable doubt as to the illegitimacy of the statute in question, have no similarity thereto. The first does not deal with an assessment from an original standpoint at all, but only with mere inequalities of distribution, and was supported on that express ground. The second deals with a situation where the people have voluntarily surrendered the constitutional right to local self-government. The law here provides for a complete supersession of the local instrumentalities without the consent of the taxing district in its corporate capacity, or the people thereof otherwise, and without any fault of the people or perhaps even of its officers, except in respect to error of judgment.

It must be remembered that the law provides for the state authority taking possession of the local administration in its discretion when it shall be made to appear that such administration has not produced an assessment in substantial compliance with law. No wilful neglect or fraud of the assessor is required. It is not even required that the regular board of review shall first have failed to perform its duty in the premises, which might remedy the whole matter. The compensation of the foreign assessor and members of the board of review, even, is required to be fixed by foreign authority and

at a level much above ordinary compensation for such services when rendered by the regular local officers, and there are provisions permitting other large expenses to be incurred, all to be, in the end, a burden upon the local taxpayers. Even the auditing of such matters is taken from control of the local auditing board and made a matter of state concern, wholly at the expense of the locality. The people of the locality are wholly ignored. Their part is to submit to the burden of taxation and pay the bills as a part of their state tax. Can any one imagine a more complete usurpation of local authority? Does not the law break down completely the constitutional safeguards of local self-government?

Enough has been said to demonstrate, in my judgment, that it is highly illogical to reason from the decisions upholding the two statutes heretofore sustained, that the one in question is valid.

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ABSTRACTS OF TITLE. See COUNTIES, 3-6.

ABUSE OF DISCRETION. See TRIAL, 3. WITNESSES, 1, 4, 5.

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At law or in equity? See EQUITY.

1. There are two cases in which a plaintiff who has planted his suit in equity and failed to sustain it may be given legal relief if the proof shows that he has a good cause of action at law therefor: (1) where a cause of action in equity once existed and is stated in the complaint, but because of the happening of some event for which the plaintiff is not responsible it no longer exists; (2) where plaintiff alleges a good cause of action in equity in good faith believing it capable of proof, but fails to prove some fact essential to a recovery in equity because such fact never existed. In both cases the complaint must state a good cause of action in equity and the plaintiff must in good faith believe it to exist at the time. *Rock County v. Weirick,* 500

2. Where, in an equitable action by a county to prevent the register of deeds from copying the county abstract books, it is sought incidentally to recover the county's share of fees collected by him for abstracts, but upon the face of the complaint plaintiff was never entitled to equitable relief of any kind, the entire complaint should be dismissed without prejudice to an action at law to recover the alleged fees. *Ibid.*

Conditions precedent. See CONTRACTS, 20.

Joinder of causes of action. See CORPORATIONS, 2. NEGLIGENCE, 9, 13-17.

3. In general, the Code requires a plaintiff to take a stand on the cause of action upon which he expects to recover, but permits departure therefrom so far as impracticable to comply therewith. *Astin v. Chicago, M. & St. P. R. Co.* 477

4. By the spirit of the Code, the plaintiff, supposing he has one or the other of two causes of action to remedy a single wrong, they not being inconsistent in the sense that the choice of one till shown to be efficient necessarily waives the other, may, acting in good faith, plead both in separate counts complying with sec. 2647, Stats. (1898), and recover on the one which the case made by the evidence entitles him to. *Ibid.*

5. In case of a person who has been injured in his person or property by wrongful conduct of another, believing such other liable

for the wrong, but is uncertain whether it was characterized by ordinary or by gross negligence,—he may seek to recover compensation on both aspects, stating each in a separate cause of action and insisting upon both up to such time as there cease to be reasonably conflicting inferences on the evidence as to which is the right one. *Ibid.*

6. In case of a situation such as mentioned in the last foregoing, upon it appearing clearly what cause of action the plaintiff has, in fact, if any, the court should take the other from the jury or dismiss the action in respect thereto. *Ibid.*

7. In case of there being the reasonably conflicting inferences mentioned in the last foregoing, on the whole evidence, the cause should be submitted to the jury with such definite instructions as to guard against a contradictory verdict being rendered. *Ibid.*

8. The dominant idea in subd. 1, sec. 2647, Stats. (1898), is to permit joinder of causes of action legal or equitable if there is some substantial point of unity between them. *McArthur v. Moffet*, 564

9. As used in said subdivision the terms "cause of action," "transaction," and "subject of action" mean different things. *Ibid.*

10. The term "cause of action" as there used includes the facts showing plaintiff's right and its violation by the defendant. *Ibid.*

11. The term "transaction" means whatever may be done by one person which affects another's rights and out of which a cause of action may arise. *Ibid.*

12. Cases in this court as to what constitutes "subject of action" cannot be harmonized, and the court does not now attempt to lay down any hard-and-fast definition which shall be applicable to all cases which may arise. *Ibid.*

13. The definition given in *Telulah P. Co. v. Patten P. Co.* 132 Wis. 425, 430, and approved in *Brahm v. M. C. Gehl Co.* 132 Wis. 674, 679, of the term "subject of the action" in sec. 2656, Stats. (1898), as being composed of the plaintiff's right and the defendant's invasion thereof, is withdrawn. *Ibid.*

14. The term "subject of action" must be deemed to mean the same thing wherever it is used in the Code. *Ibid.*

15. The clause in subd. 1, sec. 2647, Stats. (1898), in which the term "subject of action" is used will find its most frequent application in equitable actions, but is not to be limited to them. *Ibid.*

16. In possessory or proprietary actions, whether involving real or personal property, the "subject of action" is composed of the plaintiff's primary right together with the specific property itself. A statutory cause of action to quiet title to land and a cause of action for trespass on the same land arise, therefore, out of "transactions connected with the same subject of action," and may be joined. *Ibid.*

17. *It seems* that in all other actions the plaintiff's right which is alleged to have been invaded must be held to be an essential part, and perhaps in many cases the whole, of the "subject of the action," as those words are used in the Code. *Ibid.*

ADMINISTRATION. See EXECUTORS AND ADMINISTRATORS. GUARDIAN AND WARD.

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ADVERSE POSSESSION.

1. Evidence offered to sustain a claim of adverse possession must be strictly construed under the presumption that the occupancy is in favor of the true owner. *Jansen v. Huerth,* 363
2. In an action to enjoin trespasses upon an island in a navigable river, evidence *held* not to show that defendants had acquired title by adverse possession. *Ibid.*
3. It appearing that the evidence on the subject of adverse possession was fully presented, and that further trial of that issue is not required to determine the rights of the parties, such issue will not be reopened, although a new trial be ordered by the supreme court on other issues raised by the pleadings. *Ibid.*
4. In an action to enjoin trespasses upon land, in which defendants denied plaintiffs' ownership and alleged title in themselves by adverse possession, a finding by the trial court is *held* not to be a compliance with sec. 2863, Stats. (1898), and in the absence of such a finding, the record in the case not being such that the supreme court can ascertain the facts and proceed to a final adjudication, a new trial is ordered. *Ibid.*

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Review: Questions considered. See COSTS, 7.

1. A judgment declaring void certain proceedings could not be considered on an appeal from an earlier judgment rendered in an earlier action in which, though the same proceedings were involved, their invalidity did not appear. *McIntosh v. Bowers,* 74

Same: Presumptions. See APPEAL, 9.

Same: Stare decisis.

2. Where the supreme court has persistently declared approval of a rule of law, though in cases where the point was not necessarily involved, such declaration should not be lightly ignored, especially when, in presence of conflicting decisions in other jurisdictions, it amounts to an adoption of the view of those courts approving the rule. *Hawkinson v. Oatway,* 136

Same: Findings, when disturbed. See APPEAL, 7. CONTRACTS, 18. EQUITY, 3. EVIDENCE, 4. WILLS, 1.

3. Upon evidence fairly justifying either of two inferences, the decision of the trial court must control. *Kola Lumber Co. v. Stoughton Wagon Co.* 329

4. Decisions of trial courts on issues of fact will not be disturbed on appeal unless the record shows to a reasonable certainty that they are prejudicially wrong. *Schwenn v. Schwenn,* 399

5. A decision of the trial court changing a jury's finding upon a question of negligence is entitled to great weight and should not be disturbed on appeal unless clearly erroneous. *Rogers v. Brown,* 472

6. In an action for injuries sustained by a boy in a collision with an automobile which defendant was driving not faster than six miles per hour, the evidence, stated in the opinion, is *held* so strong and convincing, as against the boy's own testimony, that this court should not disturb the decision of the trial court setting aside a finding of the jury that defendant was negligent. *Ibid.*

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7. Although a judgment is *prima facie* erroneous because the trial court failed to make any finding as to an essential fact, it may be affirmed on appeal if it is clear that justice has been done. *Hawkinson v. Oatway,* 136

8. Such a judgment may be supported by an uncontradicted inference as to the essential fact, arising from evidentiary facts found. *Ibid.*

9. Prejudice to a complaining party on appeal is not presumed from mere occurrence of error. The error cannot be regarded as harmful, so as to require a reversal unless, within reasonable probabilities, had the error not occurred the result might have been materially more favorable to the one complaining of it. *Oborn v. State,* 249

10. In an action for malicious prosecution on the charge of selling mortgaged chattels, if it be shown that defendant, the mortgagee, consented to the sale, it is not error prejudicial to him to exclude a question, asked of the plaintiff, as to what she did with the chattels after such consent. *Rogers v. Van Eps,* 396

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An assignment of a claim, absolute in form, authorizes the assignee to sue thereon as the real party in interest, notwithstanding a collateral agreement whereby he undertakes to pay over

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BANKRUPTCY.

Exemptions: Life insurance policy.

1. A policy of insurance upon the life of the husband, from which the investment feature has been eliminated by the payment of the surplus to the insured at the end of the tontine period, and which remains strictly a paid-up policy of life insurance payable to the wife, is exempt from the claims of the creditors of the husband and does not pass to his trustee in bankruptcy; nor does the right or power to change the beneficiary, reserved by the terms of the policy to the insured, pass to such trustee. *Allen v. Central Wisconsin Trust Co.* 381

[2. Whether the wife, as beneficiary in such a policy, has the sole, absolute, and indefeasible title thereto, under sec. 2347, Stats. (1898), notwithstanding the reservation in the policy of the right of the insured to change the beneficiary, is not determined.] *Ibid.*

3. Assuming that in such a case the insured husband has the right to change the beneficiary, his exercise of that right after he has been adjudged a bankrupt would not convert the policy into property which would then pass to the trustee, it having been exempt at the time of such adjudication. *Ibid.*

4. The fact that such a paid-up policy shares in annual dividends, the amount of which is likely to vary from year to year, does not destroy its essential character as a purely life insurance contract, the dividend being a mere incident of the policy, the right to receive which is in the beneficiary. *Ibid.*

BOARD OF REVIEW. See CONSTITUTIONAL LAW, 5, 6.

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BROKERS.

1. One employed to find a purchaser for land under a written contract by which he is to receive a commission "for the sale of" the property, "provided a satisfactory deal can be made by" a certain date, is a mere middleman and is entitled to the commission if he produces a satisfactory purchaser, even though he is also agent for and receives pay from such purchaser. *Kilpinski v. Bishop,* 390

2. The fact that the middleman in such a case confirms representations made by the purchaser as to property exchanged in the deal is immaterial, especially where such representations are not shown to have been false. *Ibid.*

CANCELLATION OF INSTRUMENTS.

1. Where, in an action to set aside a conveyance of lands on the ground of fraud, it appeared that one of the defendants had title to the lands when plaintiffs demanded a reconveyance, but

before the action was commenced had, without plaintiffs' knowledge, conveyed to other persons, so that no cancellation and rescission could be awarded, it was proper for the court to retain the action and award damages for the fraud. *Griffiths v. Cretney*, 143

2. Evidence *held* to sustain findings that the plaintiffs relied upon false representations as to the value of wild lands taken by them in exchange for their farm and were induced thereby to make the exchange, and that they were incompetent to transact the business and did not fully comprehend it. *Ibid.*

3. The preponderance of evidence, including conflicting opinions of witnesses, as to the value of certain wild lands is *held* to show that at the time in question they were worth $12 per acre, instead of $6 and $8 as found by the trial court. *Ibid.*

4. It appearing that two of three defendants who had exchanged lands for plaintiffs' farm were partners dealing in real estate and had induced the third defendant to exchange his farm for an interest in that of the plaintiffs; that he put his farm into the exchange at a fair price and did not participate in or know of the false representations made by the other defendants as to wild lands which they put into the deal and in which he had no interest; and that he afterwards paid his codefendants full consideration for their interest in the plaintiffs' farm, it is *held* that such third defendant was not a joint wrongdoer with the others so as to be liable for the damages resulting from the fraud. *Ibid.*

5. In an action by one claiming as an heir of his father to set aside an instrument purporting to be a deed executed by the father in his lifetime conveying land "which was his homestead" to defendant (a daughter), a complaint which fails to state whether the father died testate or intestate or that he had an estate of inheritance in the land at the time of his death, and fails to describe the land definitely, but shows that defendant, not plaintiff, was in the possession thereof, is fatally defective. *Thomas v. McKay*, 524

6. An averment that the land in question was the father's homestead does not show that the father had an estate of inheritance therein. *Ibid.*

7. If, as alleged, defendant was in possession under a deed recorded, but never delivered, the action should be in ejectment. *Ibid.*

8. A deed is not rendered void by mere failure of the grantee to carry out certain promises named therein as consideration for the conveyance. *Ibid.*

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CONSTITUTIONAL LAW.

Legislative powers: Taxation: Local self-government.

1. An act of the legislature will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond reasonable doubt. *State ex rel. Hessey v. Daniels,* 649
2. The legislature has plenary power over the whole subject of taxation, within constitutional limitations. *Ibid.*
3. The persons appointed under ch. 259, Laws of 1905, by the state tax commissioners to reassess the property of a particular assessment district, or to review the assessment so made, are not officers in the constitutional sense. *Ibid.*
4. Local taxing officers, in performing their respective duties, perform governmental as well as municipal functions; and the state has a vital interest in insisting that its laws pertaining to taxation be honestly and fairly administered, to the end that the burden of taxation may be equitably distributed. Hence the state, in endeavoring to enforce the requirements of the law on that subject, is not acting as a mere interloper, but is performing a duty in which its citizens generally are interested. *Ibid.*
5. Whenever local assessors and boards of review act in disregard of their statutory duties the state has power to provide for the appointment of outside agencies to execute the law which is being ignorantly or wantonly violated, or wilfully set at defiance, as the case may be. *Ibid.*
6. Since all that the state undertakes to do under ch. 259, Laws of 1905, is to review the work done by the local officers when its proper agencies are satisfied that the law has been violated, that act cannot be declared a violation of sec. 9, art. XIII, Const., on the ground either that it deprives the electors of the local community of the right to choose their taxing officers or that it unlawfully deprives the local officers of the right to exercise their proper functions. *Ibid.*

Same: Delegation of legislative power. See FOOD, 5. MUNICIPAL CORPORATIONS, 4, 5.

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Requisites and validity. See FRAUDS, STATUTE OF. LANDLORD AND TENANT, 3, 4. SALES.
Construction: Ambiguity: Parol evidence. See RELEASE.

1. Oral testimony is not admissible to contradict or vary a written contract, but, nevertheless, is admissible to apply the contract to the subject with which it deals and to show facts and circumstances characterizing its making, where—by reason of ambiguity either in the language or the writing itself, or therein when applied to the subject with which it deals—that is reasonably required to enable the court to read the writing in the light of such characterization and thus discover what the parties intended to express therein. *Klueter v. Joseph Schlitz Brewing Co.* 347
2. A written contract is to be held to mean what the parties thereto intended it should, if such meaning can be found, by aid of rules for construction, within the reasonable scope of its language. *Ibid.*
3. The language of a written contract is not open to construction unless its meaning is ambiguous, and then, by the aid of such rules, it must speak for itself, the words, however, not being extended beyond their reasonable scope, in the light of the characterizing circumstances, in order to effect an intention not fairly expressed therein. *Ibid.*
4. When the language of a written contract is plain it is not open to construction, but though plain, viewed exclusively, if not plain, when applied, by the aid of oral evidence or otherwise to the subject with which it deals, extrinsic evidence showing the circumstances characterizing the making of the contract, is permissible for the purpose of clearing up the obscurity. *Ibid.*
5. The rule as to construction of contracts that "where the meaning is plain and leads to no absurd consequences there can be no reason for refusing to admit the meaning which the words naturally present," suggests the propriety of extrinsic evidence to apply the contract to the subject with which it deals, and if manifest unreasonableness thus appears, the propriety of evidence of the circumstances characterizing the making of the writing to aid in clearing up the obscurity. *Ibid.*
6. Extrinsic evidence is not admissible for the direct purpose of creating ambiguity in the language of a written contract which is plain, viewed exclusively, but that does not militate against the rule that extrinsic evidence is proper to apply a contract, plain in its literal sense, to the subject with which it deals, and, if the effect is to disclose ambiguity, like evidence to show the circumstances characterizing the making of the contract. *Ibid.*
7. From the foregoing the rule results that ambiguity in a written contract calling for construction may arise as well from words plain in themselves but uncertain when applied to the subject matter of the contract, as from words which are uncertain in their literal sense. *Ibid.*

8. The rule that contracts which are plain are not open to construction, and the one that evidence of conversations between parties respecting the contract prior to and inclusive of the making thereof, are not admissible to explain it, and the one that extrinsic evidence is not proper to vary or contradict a written contract, all harmonize with the rule that—where a contract, though plain in its literal sense, is uncertain, when applied by oral evidence or otherwise to the subject with which it deals—such evidence is proper to show the circumstances characterizing the making of the contract in aid of its construction, which latter rule is a logical deduction from the basic one that "where a contract is plain and leads to no absurd consequences it must speak for itself," and otherwise it may speak in the light of the circumstances under which it was made. *Ibid.*

9. Where a conversation, had at the time of making a written contract, relates to some condition with reference to which it was made, and such conversation is referred to in the writing, without specifying such condition, so as to make it a part of the contract, then evidence of such conversation to the extent of showing such condition, is within the rule that extrinsic evidence characterizing the making of a contract is admissible in aid of construing it, in harmony with the rule that evidence of mere conversations between parties in making a written contract, inclusive of the final closing of it, is not admissible to explain it. *Ibid.*

10. The rule that—when a contract is ambiguous, viewed in the light of the subject matter with which it deals, though plain in its literal sense, it may, by aid of extrinsic evidence showing the circumstances characterizing its making, be read very different from its literal sense, so long as the reasonable scope of its words be not exceeded, if necessary to give effect to the purpose expressed and intended—does not involve any modification of the contract but "has relation to the application of the language used to the subject within the contemplation of the parties as represented by the situation then existing and the surrounding circumstances, which it may be assumed they then had in view." *Ibid.*

Per BARNES, J., *dissenting:*

11. The written contract in this case, so far as it directed the shipment of ice from M. to certain points "via Ill. Cent. R. R.," which railroad extended from M. to those points, was not ambiguous, although said railroad did not reach the loading place of the ice in M. and although other shipments were directed to be "via" other railroads which did not reach M. at all. *Ibid.*

12. The fact that the contract stated that the orders for shipment of the ice were sent "as per" a former conversation, did not render parol evidence admissible to show a prior agreement for shipment in some other way than that definitely and unambiguously stated in the writing. *Ibid.*

13. Conversations leading up to the making of a written contract are admissible to explain an ambiguity in the writing, but cannot be shown to import ambiguity into an otherwise unambiguous contract. *Ibid.*

14. The mere fact that a contract may appear unreasonable to this court in view of events which have transpired since it was made, or even in view of the situation of the parties when it

was made, is not a sufficient reason for holding the contract to be ambiguous. *Ibid.*

15. Where a contract does not express the true agreement of the parties, its reformation should be by appropriate action in equity, not by importing ambiguity into the contract and then interpreting it to mean something different from what its words plainly imply. *Ibid.*

Same: Attorney and client.

16. A contract between an attorney and persons against whom he has claims for collection and in process of foreclosure, that he will procure for them a loan wherewith to pay the claims and will endeavor to obtain a reduction of the claims, does not carry with it a duty on the part of the attorney to rebate the attorney fees due him from the creditors. *Smith v. Lenz,* 615

Rescission: Fraud: Delay: Restoring what has been received: Liens.

17. A complaint for rescission of contract on the ground of fraud, to be sufficient for such purpose, must show special circumstances, in the judgment of the court, rendering rescission by act of the plaintiff and his remedy at law not adaptable at all to cure the wrong, or to do so adequately. *Hall v. Bank of Baldwin,* 303

18. The decision of the trial court respecting sufficiency of special circumstances mentioned in the foregoing, relates to matter of fact and should not be disturbed on appeal unless clearly wrong. *Ibid.*

19. A statement of circumstances, in connection with a showing of fraud warranting the wronged party in rescinding the contract by his own act, indicating that the wrongdoer is insolvent and there is no person adequately coercible at law to reimburse the plaintiff, are sufficient for equity to deal with the matter. *Ibid.*

20. Neither an offer before suit to restore to the wrongdoer the property received from him on a contract rescindable for fraud, or plea of willingness to restore, is a condition precedent to maintenance of an action in equity for rescission, though failure to make such offer or plead such willingness are proper circumstances to be considered on the question of costs. *Ibid.*

21. Where the representations, rendering a transaction rescindable for fraud, relate to matters of record, the wronged party is not chargeable with notice of the facts, but may rely on such representations, in the absence of knowledge of the truth or want of ordinary care in respect to the matter. *Ibid.*

22. A person, induced by false representations to deal with another under such circumstances as to render him capable of rescinding the transaction on the ground of fraud, does not, within the limitations of the written law, lose any remedy to redress the wrong by mere delay to act in the matter, prior to receiving knowledge of the facts or failure by reason of want of ordinary diligence to obtain such knowledge. *Ibid.*

23. The rule requiring an offer to restore what a person has received on a contract rescindable for fraud, or competency or willingness in that regard, goes no further than justice, as regards the wrongdoer, demands under the circumstances of the case, such rule being purely of an equitable rather than of a technical nature. *Ibid.*

24. Anything short of an unconditional offer by the defrauded person to restore what he received on a contract rescindable for fraud,

or willingness, or competency in that regard, which does not prejudice the wrongdoer, as by a retention of money received in part payment upon the contract, leaving such wrongdoer liable to respond upon a basis which accords him full benefit of the money retained, is to all intents and purposes a return of such money. *Ibid.*

25. Insistence, before suit by a defrauded person, upon retaining the property received upon a contract rescindable for fraud, persisted in by the pleading in an action in equity for rescission, does not necessarily render such pleading insufficient to state a good cause of action. *Ibid.*

26. Where it appears necessary to the protection of a defrauded party that he should have a lien on the property received by him on a contract rescindable for fraud, in an equitable action to that end he may be adjudged to have a right equivalent to a lien on such property to secure restoration of the consideration parted with by him on such contract, and the court may adapt its decree so as to adjudge the extent of the lien, fix it upon the property, and provide for its just enforcement. *Ibid.*

27. The foregoing rule is based on the broad doctrine that "such is the flexibility of courts of equity in adapting their decrees to the actual condition of the parties that its pervading excellence is, that it varies its adjustments and propositions so as to meet the very form and pressure of each particular case in all its complex habitudes." *Ibid.*

28. If a person having possession of a subject of purchase, obtained in a transaction rescindable for fraud, be so circumstanced that it is essential for his protection that he retain such subject as security, and that may be done without injustice to the wrongdoer, a court of equity—without any offer by the former to return such subject, except upon condition of the consideration parted with therefor being restored, or there being protection to that end—may afford a remedy by rescission and retention of such subject as security for a return of such consideration, shaping the decree to fit the particular case whatever may be "its complex habitudes." *Ibid.*

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 2. MASTER AND SERVANT, 4. RAILROADS, 2.

CONVERSION. See SHERIFFS.

CONVEYANCES. See DEDICATION, 1–4. VENDOR AND PURCHASER.

CORPORATIONS.

Incorporation: Fraud of promoters: Action by stockholders.

1. A complaint in equity by stockholders in a corporation, in an action against its promoters and officers, is *held* to state a cause of action. *Simon v. Weaver,* 330

2. Where such complaint states wrongs against the corporation only and relief on its behalf only is prayed, there is but one primary right sought to be enforced and but a single cause of action stated, although a number of wrongful acts by which the fraudulent scheme was consummated are set out and different forms of relief are asked. *Ibid.*

3. Where in such a case it is evident from the allegations of the complaint, showing that the defendants are the directors and

control the corporation, that the action would not be brought or prosecuted in good faith by the corporation, it is properly brought by stockholders and the corporation is a proper party defendant. *Ibid.*

Capital stock: Sales. See TRIAL, 4.

4. Where corporate stock is sold, paid for, and delivered pursuant to a transaction wherein the vendor, as a condition of the sale, orally agrees to repurchase it at the option of the buyer, the whole constitutes one original contract, which is sufficiently performed to take it out of the statute of frauds (sec. 2308, Stats. 1898). *Hankwitz v. Barrett,* 639

5. The fact that the buyer of corporate stock signed a written subscription therefor when or before the sale was made, does not preclude proof of an oral agreement by the vendor to repurchase. The subscription being a unilateral contract containing the promises of one party only, the promise of the other may be shown by parol, where it does not contradict the writing. *Ibid.*

Same: Compelling transfer on the books.

6. In a proceeding under sec. 1752, Stats. (1898), to compel transfer of corporate stock the court may decide the matter upon the affidavits of the parties, or may receive evidence from either side. *Schwab v. Smith,* 427

7. An order requiring the transfer to be made, based upon affidavits, will be sustained on appeal if there was any reasonable ground for holding that appellant's affidavit did not satisfactorily meet the case made by that of the respondent. *Ibid.*

8. An order requiring the transfer of stock is *held* proper in this case upon affidavits stated in the opinion. *Ibid.*

9. Ordinarily the transfer of stock on the books of a corporation may be made by the secretary acting alone, even though it may be necessary for the president to join in the issuance of a new certificate. *Ibid.*

Torts of agents: Ratification: Who are agents. See DAMAGES, 3.

10. If the agent of a corporation, acting within the scope of his duties, even though abusing his authority in that he uses methods not expressly or impliedly authorized, or which could reasonably have been anticipated, commits a remediable wrong to another, causing that other recoverable damages, the corporation as well as the agent is liable. *Topolewski v. Plankinton Packing Co.* 52

11. In case of the agent of a corporation, assuming to act in its behalf, committing a remediable wrong to another by some act outside the scope of his authority, if the corporation, with knowledge of the facts, ratifies his conduct, it is liable the same as if such act was done by its authority. *Ibid.*

12. In case a person to whom the general management of a corporation is intrusted by corporate action, or one who is permitted to exercise such authority, employs another to perform some service for the corporation, such employment makes such other a corporate agent as to all acts done by him within the scope of his duties, and in case he acts outside such duties, its agent so far as such acts are subsequently ratified. *Ibid.*

13. Ratification by a corporation of the acts of a person falsely assuming to have authority in the premises, may be established,

circumstantially, as by conduct of those intrusted with the governing authority or general management of the corporate affairs clearly showing approval. *Ibid.*

Foreign corporations. See EMINENT DOMAIN, 1, 2. PROCESS.

COSTS.

Nature, grounds, and extent of right. See CONTRACTS, 20.

Same: Construction of statutes.

1. Sec. 2925, Stats. (1898), is to be construed liberally in favor of the right to recover costs. The words "where there is no new trial in the appellate court" are not limited in their application to cases which are not triable anew in that court. *Chalutz v. Wisconsin Central R. Co.* 623
2. The term "costs of suit incurred" in sec. 4266, Stats. (1898), is not limited to disbursements. *Ibid.*

Same: Supreme court.

3. Costs are not allowed in this case for the printing of a case and briefs which violate Supreme Court Rule 6. *Griffiths v. Oretney,* 143
4. Costs for a printed case violating Supreme Court Rule 6 are disallowed under Rule 44. *Gerbig v. Bell,* 157
5. Respondent having printed a supplemental case which contained matter not found in the bill of exceptions, other matter relating to questions not raised by the appeal, and testimony in the form of question and answer which had been correctly given in narrative form in the original case, costs for printing such supplemental case are disallowed. *Hankwitz v. Barrett,* 639

Same: Appeal from justice's court. See COSTS, 1.

6. Where, on appeal by defendant from a judgment against him in a justice's court, an action is pending for trial *de novo* in the circuit court, a tender under sec. 4266, Stats. (1898), must include the $10 costs provided for in sec. 2925. *Chalutz v. Wisconsin Central R. Co.* 623

Amount, rate, and items. See COSTS, 2, 6.

Same: Disbursements. See COSTS, 2.

Taxation: Review.

7. A party claiming that costs have been improperly inserted in a judgment in violation of sec. 2894*a*, Stats. (1898), should bring the matter to the attention of the trial court and obtain a ruling thereon before review can be had in the supreme court. *Spence v. Milwaukee,* 47

COUNTERCLAIM. See SALES, 2. SETOFF AND COUNTERCLAIM.

COUNTIES.

Officers: County superintendents.

1. A county superintendent of schools, even though his jurisdiction be confined to a district less than the whole county, is a county officer whose term of office continues for two years and *until his successor is qualified,* and under sec. 694, Stats. (1898), his salary cannot be increased or diminished during such term. *Sheboygan County v. Gaffron,* 124

2. Where, pursuant to ch. 307, Laws of 1903, changing the time for election of county superintendents, a superintendent continued in office for six months after the two years for which he was originally elected, such six months were part of his original term, and an increase of salary which had been voted by the county board during such two years had no application to such six months. *Ibid.*

Property: Purchase and sale.

3. By ch. 352, Laws of 1864, counties were authorized to purchase complete abstracts of title to the real estate therein, but the time limited for the exercise of this power, as extended by ch. 39, Laws of 1867, expired in June, 1867, and thereafter there was no express authority for establishing anything of that character beyond a tract index, until the enactment of ch. 149, Laws of 1881. *Rock County v. Weirick,* 500

4. A county cannot without legislative authority go into the abstract business for profit. *Ibid.*

5. Where a county, assuming that it had power to procure title abstract books and keep them in the register's office for the benefit of the public, contracted for the compilation of such books, and a few days later the legislature supplied the necessary authority and the work thereafter proceeded to completion, the books were not mere literary property of the county, but became a part of the public records of the register's office which any person had a right to copy under the reasonable supervision of the register, even for the purpose of making a rival set of abstract books. *Ibid.*

6. Even though the "purchasing committee" of a county board had no authority to sell to the register of deeds certain blank books belonging to the county (for which he paid $48), yet after he had in good faith expended $900 in copying into said books the public abstracts of title, with a view to going into the abstract business at the close of his official term, a court of equity would not compel him to restore the books to the county upon tender of the price paid by him. *Ibid.*

COUNTY COURTS. See COURTS, 5.

COUNTY SUPERINTENDENTS. See COUNTIES, 1, 2.

COURTS.

Supreme court: Superintending control: Jurisdiction, when exercised.

1. The jurisdiction of the supreme court in respect to its superintending control over inferior courts is not to be exercised upon light occasion, but only upon some grave exigency; the writs by which it is exercised will not be used to perform the ordinary functions of an appeal or writ of error; the duty of the court below must be plain and the actual or threatened violation thereof clear; the results must not only be prejudicial but must involve extraordinary hardship; the remedy by appeal or writ of error must be utterly inadequate; and the application for the exercise of the power of superintending control must be speedy and prompt. *Petition of Pierce-Arrow M. C. Co.* 282

2. In order that the duty of the court may be plain within the foregoing rule, the situation must be such that hardly more than a

statement of the facts is necessary to convince the legal mind as to what that duty is. Where questions of law or fact are involved of such difficulty that a judge may reasonably, proceeding considerately, commit judicial error, the power of superintending control will not be exercised, but the parties will be left to their remedy by appeal. *Ibid.*

3. Where an application to vacate the service of process upon a foreign corporation, in an action where the cause of action arises within this state, involves the consideration of a long written contract between the corporation and the person upon whom service is made, relating to sales to and by the latter, from which it appears that, although the term "agent" is not used, it is a serious question whether an agency in fact is not thereby created, it cannot be said that the duty of the court to set aside the service is plain, within the meaning of the rule above stated. *Ibid.*

4. In such a case the facts that an order denying the application is not appealable and that to obtain a review of the question on appeal defendant must permit the entry of a judgment by default against it for heavy damages, do not make a case of such exceptional hardship that the supreme court should intervene in the exercise of its power of superintending control. TIMLIN, SIEBECKER, and KERWIN, JJ., dissenting, are of the opinion that refusal to exercise the supervisory power in such a case amounts to a denial of due process of law. *Ibid.*

County courts: Territorial jurisdiction: Holding court in another county.

5. Proceedings in the county court of one county, conducted entirely in another county, are invalid. *McIntosh v. Bowers,* 74

CREDIBILITY. See WITNESSES, 5–7.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime in general. See FORGERY. HOMICIDE. INDICTMENT AND INFORMATION, 1, 4, 6. LIBEL AND SLANDER, 4. RAPE, 1.

Same: Misdemeanors.

1. To procure a warrant to be issued against a person who is a witness in a proceeding before a city council to revoke a retail liquor dealer's license, for the purpose of intimidating that witness in giving his testimony in such proceeding, is a misdemeanor at common law. *Ruhland v. Cole,* 367

Former jeopardy.

2. If one is put in jeopardy as regards a criminal charge, the jeopardy is subject to supersession where the ends of justice require the jury to be discharged and another jury to be impaneled to try the case. *Oborn v. State,* 249

3. In case the trial judge, in the progress of a trial, because of any emergency, concludes that it is imperatively necessary for him to suspend the trial indefinitely, and especially if counsel for the accused concurs in that view without protest by the accused brought to the attention of the court, and in such situation the jury is discharged, leaving the trial to be taken up again before another jury, the jeopardy created by the partial trial is thereby wholly superseded. *Ibid.*

4. In case of an accused person, after having been put in jeopardy, taking or consenting to any proceeding rendering necessary a new or additional trial in order to fully conclude the case, he cannot in such further trial successfully claim immunity on the ground of former jeopardy created by the first proceeding. *Ibid.*

Pleading. See INDICTMENT AND INFORMATION.

Course and conduct of trial in general. See JURY.

Same: Change of venue. See VENUE.

Same: Reception of evidence. See FORGERY. INSANE PERSONS, 1, 2.

5. The constitutional guaranty of the right of the accused person in a criminal prosecution to meet the witnesses face to face, does not extend to mere official authenticators of official documents offered in evidence on the subject of competency of a person produced as a witness to testify. *Oborn v. State,* 249

6. After a decision against the accused on a special issue as to insanity, evidence of his mental condition is only admissible on the general issue as bearing on the grade of the offense. *Ibid.*

Same: Weight and sufficiency of evidence. See INSANE PERSONS, 3–7. RAPE, 1.

Same: Instructions to jury. See INSTRUCTIONS TO JURY, 3, 5.

Same: Custody, conduct, and deliberations of jury.

7. It is improper, in the trial of a capital case, to allow communications, verbal or written, between jurors and outside parties, unless strictly necessary and with knowledge of counsel on both sides. *Oborn v. State,* 249

8. Careful isolation of the jury, in a capital case, from all outside influence, so as to avoid any suspicion of the result being characterized by any improper influence, is advised. *Ibid.*

9. While it was misconduct on the part of jurors to visit the damaged building during the trial without a view having been authorized, such misconduct does not require a reversal of the judgment under sec. 3072*m*, Stats. (Laws of 1909, ch. 192), no substantial rights of the accused appearing to have been affected thereby. *Parb v. State,* 561

Same: Waiver of rights and of irregularities.

10. An accused person in a criminal case is competent to waive irregularities and rights, whether constitutional or statutory, very much the same as a party may in a civil action. *Oborn v. State,* 249

11. One accused of crime is competent to waive any irregularity or right, constitutional or statutory, except in a capital case the right of trial by a jury of twelve men, and that extends to waiver of the right of trial by a jury of twelve men competent to act as jurors. *Ibid.*

12. The right to a jury trial and that to a trial in the county of the offense and the one to have all the issues tried before a single jury, are subject to waiver by the accused. *Ibid.*

CROSS-EXAMINATION. See RELEASE, 4. WITNESSES, 4, 5.

DAMAGES.

Nature and grounds. See CANCELLATION OF INSTRUMENTS, 1. DAMAGES, 1. DECEIT. INSTRUCTIONS TO JURY, 1. SPECIFIC PERFORMANCE, 3.

Measure of damages. See EMINENT DOMAIN, 3.

Exemplary or punitory damages.

1. Punitory damages are not allowable as matter of right, nor are such damages allowable, at all, unless the wrongdoer in perpetrating the wrongful act is actuated by bad intent to injure, either actual or with such reckless disregard of consequences as to be equivalent thereto. *Topolewski v. Plankinton P. Co.* 52
2. It is for the court, in an action for damages sounding in tort, to determine whether, in any reasonable view of the evidence, punitory damages would be proper, and if so, to leave it to the jury to allow such damages or not, in their discretion, informing them, adequately, that such an allowance is not to be made out of any regard for the plaintiff but solely as a punishment of the defendant and a warning to others, and is to be measured out as to amount solely in that view. *Ibid.*
3. Punitory damages are not allowable, generally, against a corporation for the malicious act of its agent within the scope of his authority or otherwise; its liability is limited, in any case, to actual damages, in the absence of authority to commit the wrong with its malicious characteristic, or subsequent ratification of its commission with knowledge of the facts. *Ibid.*

DEATH.

Administration. See EXECUTORS AND ADMINISTRATORS, 1.

Acts causing death: Nonresident aliens: Pleading.

1. In an action for death caused by wrongful act, an allegation that decedent "left surviving him his father and mother, . . . who are nonresident aliens, and his sisters," one of whom is the plaintiff, is construed, in connection with other allegations of the complaint, to mean that the sisters and the decedent were residents of this state. *Pries v. Ashland L., P. & St. R. Co.* 606
2. Such an allegation negatives the idea that decedent left surviving a widow or children who would be entitled to the damages recoverable for his death. *Ibid.*
3. Nonresident aliens not being within the purview of secs. 4255, 4256, Stats. (Laws of 1907, ch. 581), nor entitled to the damages recoverable thereunder, the existence of such aliens does not debar from the right to such damages other surviving relatives, resident in this state, who would not have such right if the aliens were residents. *Ibid.*

Competency of witnesses. See WITNESSES, 3.

DEBTOR AND CREDITOR. See ASSIGNMENTS. BANKRUPTCY. CONTRACTS. FRAUDS, STATUTE OF. GUARANTY. PLEDGE. SALES. SCHOOLS AND SCHOOL DISTRICTS, 1–3. SETOFF AND COUNTERCLAIM. SHERIFFS.

DECEIT.

When a party, either knowingly or without knowledge on the subject, makes material and false representations of fact to another in order to induce him to enter into a contract, and such other without knowledge or the present means of knowledge on the subject is thereby induced to enter into the contract in reliance on the truth of the representations and suffers legal damage by reason thereof, an action for deceit will lie. *Helberg v. Hosmer,* 620

DEDICATION.

1. A plat duly acknowledged and recorded under the act of the territory of Michigan of April 12, 1827, conveys the fee in trust of a public square designated on such plat, and leaves no present interest in the dedicator or in his heirs or grantees in such land. *Thorndike v. Milwaukee Auditorium Co.* 1

2. A statutory dedication by such platting has the legal effect of a conveyance in fee in trust for the public. *Ibid.*

3. A defective statutory dedication, if accepted by the public, is good as a common-law dedication. *Ibid.*

4. A common-law dedication of land for public uses conveys an easement in the public sufficient for such purposes, but leaves the fee in the dedicator. *Ibid.*

5. Under sec. 2263, R. S. 1878, a statutory dedication which conformed to the statute or which, failing so to conform in minor particulars, was corrected by a curative statute (ch. 348, Laws of 1883), passed the fee in trust for the public to the town, city, or village and left no present interest in the dedicator or his heirs in case of a public square. *Ibid.*

6. It is the settled law of this state that in the case of a road or street, whether acquired by condemnation, by conveyance, by common-law dedication, or by statutory dedication, the city, town, or village takes only an easement for highway purposes, while the fee is held by the abutting owners. This brings all roads and streets within an uniform rule and has become a rule of property; but this rule will not be extended to public squares which have become such by statutory dedication. *Ibid.*

7. Public squares created by statutory dedication under sec. 2263, Stats. (1898), and accepted by the public belong to the city in fee in trust for the public, and the dedicator or his heirs have no present interest in the land. *Milwaukee v. M. & B. R. Co.* 7 Wis. 85, so far as it holds to the contrary, overruled. *Ibid.*

8. Where the plaintiffs have no interest differing from that of any other member of the public in preventing misuser of such public square, they cannot maintain an action in their own right as heirs of the dedicator. *Ibid.*

DEEDS. See CANCELLATION OF INSTRUMENTS.

DELEGATION OF LEGISLATIVE POWER. See FOOD, 5. MUNICIPAL CORPORATIONS, 4.

DEMURRER. See PLEADING, 2–5.

DEPOSITIONS. See WITNESSES, 3.

DESCENT AND DISTRIBUTION.

Advancements.

1. Sec. 3959, Stats. (1898), excludes by implication all other evidence to prove an advancement than such as is there indicated. *Arthur v. Arthur,* 126

2. The charge in writing by which, under said sec. 3959, an advancement may be evidenced, must be made contemporaneously with the gift or grant. *Ibid.*

Inheritance tax. See TAXATION, 7–11.

Assignment of estate. See WILLS, 4.

DIRECTORY STATUTES. See SCHOOLS AND SCHOOL DISTRICTS, 4.

DISBURSEMENTS. See COSTS, 2.

DISCRETION. See EMINENT DOMAIN, 5. TRIAL, 1, 3. WITNESSES, 1, 4, 5.

DISMISSAL AND NONSUIT. See ACTION, 2, 6.

DISQUALIFICATION. See JUDGES.

DIVORCE.

Grounds: Cruel and inhuman treatment.

1. Ill treatment of one spouse by the other which, though not operating directly on the body, is of a nature well calculated to inflict pain and suffering in body and mind and thus to produce injurious results which make cohabitation dangerous to the former's health and life and to render it wholly impracticable for him to properly discharge his marital obligations, is cruel and inhuman treatment in the law and constitutes ground for divorce. *Kohl v. Kohl,* 214

Conclusiveness of adjudication. See JUDGMENT, 3.

Alimony, allowances, and disposition of property. See WILLS, 18.

2. Upon the granting of a divorce to the husband on the ground of cruel treatment by the wife, a division of his property, stated in the opinion, is affirmed on an appeal by the wife. *Kohl v. Kohl,* 214
3. A stipulation in such case, stated in the opinion, was properly disregarded by the trial court. *Ibid.*
4. Real and personal property accumulated and paid for from a husband's earnings and from the income from sales of produce raised on the land principally by the labor of the wife and children, must in a divorce action be deemed to have been derived from the husband and to be a part of his estate which may be divided between the parties, even though the title to a part of such property be in the wife's name. *Cevene v. Cevene,* 393
5. In view of an antenuptial contract between the parties in this case it was error to provide in such judgment for a division of the husband's property or to award to the wife anything more than a reasonable allowance for alimony; and such allowance, under the circumstances of this case, should not exceed $1,000. *Schwenn v. Schwenn,* 399

[6. Whether in case of such an antenuptial contract the court can, in a judgment of divorce, without consent of the parties, make a division of property or award to the wife anything beyond alimony, strictly so called, is not determined.] *Ibid.*

DUE PROCESS OF LAW. See FOOD, 4. MUNICIPAL CORPORATIONS, 5.

EASEMENTS. See DEDICATION, 4, 7.

EJECTMENT. See CANCELLATION OF INSTRUMENTS, 7.

ELECTION OF REMEDIES. See NEGLIGENCE, 15–17.

EMINENT DOMAIN.

Nature, extent, and delegation of power: Foreign railroad.

1. The right of eminent domain cannot be exercised by foreign railroad companies unless expressly granted to them by law. *Great Northern R. Co. v. McCord,* 589

2. The omission from sec. 1845, R. S. 1873, of the words "formed under this act or organized under any law of this state," contained in sec. 13, ch. 119, Laws of 1872, and the further omission of the provisions of sec. 55 of the same act, are significant as indicating that the revised law was intended to embrace all railroads and to be of general application, and it is accordingly *held* that the power of eminent domain is conferred on all railroad corporations doing business in this state regardless of whether they are domestic or foreign organizations. *Ibid.*

Remedies of owner of property. See JUDGMENT, 4, 5.

Compensation: Measure of damages.

3. Where, after an action is begun by a landowner against a railroad company which has wrongfully taken possession of his land, to restrain the use of the land for railroad purposes and to recover damages for the trespass, the railroad company institutes condemnation proceedings against the land in question, the damages awarded such owner in the trespass action should not include those incident to any change in the premises caused by the grading of the roadbed or by other acts affecting the physical condition of the land, since such elements of damage must be taken into consideration in the condemnation proceedings. *Great Northern R. Co. v. McCord,* 589

Payment of award into court: Withdrawal by landowner.

[4. Whether if the amount awarded to a landowner in proceedings to condemn his land for railroad purposes is paid into court pursuant to sec. 1850, Stats. (1898), and is withdrawn by the landowner within the time limited for appealing and before the railroad company has taken possession of the land, and the company subsequently takes possession and does not appeal, such withdrawal bars the right of the landowner afterwards to prosecute an appeal from the award, not determined.] *Groth v. Milwaukee Northern R. Co.* 537

5. Where after such a withdrawal of the money by the landowner he appealed from the award, and no suggestion that he had lost his right to appeal was made until upon a second trial, after the appeal had been pending for a long time and the appellant had incurred much expense upon the faith of such remedy being open to him, and the railroad company then asked leave to plead the withdrawal as a supplementary defense, the company was estopped by its delay from insisting on such defense, or at least the court might properly, in its discretion, refuse to permit the defense to be so brought in. *Ibid.*

EQUITABLE CONVERSION. See WILLS, 14, 15.

EQUITY.

Jurisdiction. See ACTION, 1, 2. CANCELLATION OF INSTRUMENTS. CONTRACTS, 17–28. COUNTIES, 6. INJUNCTION. MUNICIPAL CORPORATIONS, 3, 11. SPECIFIC PERFORMANCE, 1. TRUSTS AND TRUSTEES, 2. WILLS, 21, 22.

Same: Rescission of contract upon ground of fraud. See CONTRACTS, 17–28.

1. A court of equity should not entertain an action for rescission of contract merely upon the ground of fraud. *Hall v. Bell,* 296

2. To warrant a court of equity in affording its jurisdiction for rescission on the ground of fraud, there must be, in connection

with that element, special circumstances rendering rescission by act of the plaintiff and his remedy at law not adaptable to adequately cure the wrong. *Ibid.*

3. Whether special circumstances are sufficient under the foregoing rule, is a matter for determination by the trial judge as one of fact within such range for the exercise of judgment, that the decision cannot properly be disturbed on appeal unless clearly wrong. *Ibid.*

4. Under the foregoing any mere change in the circumstances of the defrauder leaving him or some other party legally liable who can be made to adequately respond in an action at law, is not sufficient. *Ibid.*

5. If a person invokes equity for relief by rescission of contract, who has in his possession property received on such contract, holding the same as security, and fails to state special facts in connection with his plea of fraud to warrant the action for rescission, but does state facts sufficient to enforce his right against the property as security, the action may stand as one for foreclosure. *Ibid.*

Laches. See CONTRACTS, 22.

Parties. See MUNICIPAL CORPORATIONS, 3.

ESTOPPEL. See EMINENT DOMAIN, 5. MUNICIPAL CORPORATIONS, 9.

EVICTION. See LANDLORD AND TENANT, 2.

EVIDENCE.

Presumptions. See ADVERSE POSSESSION, 1. APPEAL, 9.

Competency. See DESCENT AND DISTRIBUTION. WITNESSES, 1–3.

Res gestæ. See RAILROADS, 3.

Admissions. See RELEASE, 4.

Parol or extrinsic evidence affecting writings. See CONTRACTS, 1–15. CORPORATIONS, 5.

Opinion evidence: Competency of experts.

1. A nonexpert witness cannot give a general opinion as to the mental capacity of a person, but may testify as to specific interviews and the impression left upon his mind as to the person's mental peculiarities exhibited in such interviews. *Robinson v. State,* 205

2. Counsel who calls a witness to testify within the field of opinion evidence, may frame his question upon such hypothesis as he thinks is reasonably warranted by the evidence, aiming to reasonably cover an entire situation, so warranted, subject to the opinion of the court as to competency. *Oborn v. State,* 249

3. On the question of competency, the interrogatory to the expert is not to be condemned because not warranted from the viewpoint of adverse counsel, since each party may take and have presented to the jury any reasonable position, in the judgment of the court, by propounding to witnesses such party's own hypothesis, leaving the weight of the answer to the jury and to turn, in part at least, on whether such hypothesis presents the true state of the case. *Ibid.*

4. The decision of the trial court on the question of competency, is not to be disturbed on appeal unless it not only appears clearly

wrong but that, had the error not occurred, the result of the trial might, within reasonable probabilities, have been materially more favorable to the complaining party. *Ibid.*

Same: Effect of opinion evidence. See INSTRUCTIONS TO JURY, 3.

Weight and sufficiency. See ADVERSE POSSESSION, 1–3. APPEAL, 6, 8. CANCELLATION OF INSTRUMENTS, 2–4. CORPORATIONS, 13. CRIMINAL LAW, 3–7. GUARANTY, 5. HIGHWAYS, 1. INSURANCE, 5, 10. MALICIOUS PROSECUTION, 9. MASTER AND SERVANT, 2, 5. MUNICIPAL CORPORATIONS, 8. RAILROADS, 2, 5, 6. RAPE, 1. RELEASE, 5. SHERIFFS, 2. WATERS AND WATERCOURSES, 1.

EXECUTORS AND ADMINISTRATORS.

Administration, when granted. See GUARDIAN AND WARD. WILLS, 2, 3.

1. Upon the death of an inhabitant or resident of this state a *prima facie* showing, or even a *bona fide* claim, that he left an estate will support the granting of letters of administration by the proper county court; and the question of the validity of such claim should be left for future litigation in the proper forum and between the proper parties. *Barlass v. Barlass,* 497

2. The mere existence of assets, irrespective of amount or value, will support a grant of administration. *Ibid.*

Assignment of estate. See DESCENT AND DISTRIBUTION. WILLS, 4.

EXEMPLARY DAMAGES. See DAMAGES.

EXEMPTIONS. See BANKRUPTCY, 1, 3. MUNICIPAL CORPORATIONS, 4, 6. TAXATION, 1–6.

EXPERT TESTIMONY. See EVIDENCE. INSTRUCTIONS TO JURY, 3.

FALSE PRETENSES. See INDICTMENT AND INFORMATION, 1, 4, 5.

FALSE REPRESENTATIONS. See BROKERS, 2. CANCELLATION OF INSTRUMENTS, 2, 4. CONTRACTS, 22. DECEIT.

FELLOW-SERVANTS. See MASTER AND SERVANT, 9–11.

FINDINGS. See ADVERSE POSSESSION, 4. APPEAL, 3–7. CONTRACTS, 18.

FIRE INSURANCE. See INSURANCE.

FIRES.

See INDICTMENT AND INFORMATION, 6. RAILROADS, 6.

1. In an action for destruction of plaintiff's property by fire originating on defendant's premises, assuming that defendant's refuse burner was equipped with reasonably safe appliances, it is *doubted* whether a finding by the jury that defendant was negligent in operating its sawmill and refuse burner at the time in question would be sustained by the evidence, which tended to show, among other things, that a high wind was blowing, that there had been a long period of drought, that there was a large quantity of lumber and of inflammable refuse on defendant's premises, separated however from the refuse burner by a clear space of two hundred feet, and that fires in the lumber yard were frequently started by sparks from the refuse burner. *Jacob Johnson F. Co. v. Wachsmuth L. Co.* 632

2. The question whether the spark-arrester on defendant's refuse burner was defective should, upon the evidence, have been submitted to the jury. *Ibid.*

3. A question submitted to the jury as to whether defendant was negligent "in failing to provide suitable means and appliances to prevent and put out fires" is *held* broad enough in its terms to include the inquiry whether a proper spark-arrester had been provided, although, after the question had been answered in the negative, the trial court stated that it had not been understood as referring to the spark-arrester and that the undisputed evidence was that the spark-arrester was defective. *Ibid.*

FLOODS. See WATERS AND WATERCOURSES.

FOOD.

1. Laws regulating the labeling and sale of food products within the state, so far as they affect interstate commerce, are within the field of concurrent jurisdiction of the state and federal governments, wherein the state may enact appropriate regulations if they do not conflict with federal laws. *McDermott v. State*, 18

2. After merchandise transported from one state to another has become mingled with the general property of the latter state by being treated as other property for sale to customers at retail, it is no longer within the channel of interstate commerce, and the fact that it is being sold in the original packages does not prevent the state from subjecting it to appropriate police regulations. *Ibid.*

3. The act of Congress of June 30, 1906 (Food and Drugs Act), regulates sales beyond the channels of interstate commerce in the District of Columbia and the territories, but does not regulate such sales, *in the states*, of articles transported from one state to another. It therefore does not preclude state legislation such as ch. 557, Laws of 1907, which does not prohibit the sale of the articles specified but seeks to regulate the traffic therein and prevent deception by prescribing how the packages shall be labeled and branded to give information as to their contents. *Ibid.*

4. Such legislation to protect the public against imposition and deception, even in the sale of articles of food which are wholesome, may be enacted under the police power, and importers and vendors of such articles are not thereby deprived of liberty or property without due process of law in violation of secs. 1, 8, 9, 13, art. I, Const. of Wisconsin, or Amendm. XIV, Const. of U. S. *Ibid.*

5. The first clause in sec. 4601—1*a*, Stats. (Laws of 1907, ch. 557), prohibiting the sale of unmixed syrups, molasses, or glucose unless true to name as defined in the standards of purity "latest promulgated by the United States secretary of agriculture," and that part of said section which regulates the sale of syrups or molasses mixed with glucose, are so distinct and independent of one another that, even if the first clause is invalid because of indefiniteness or because it attempts to delegate legislative power to the secretary of agriculture (a point not determined), such invalidity does not affect the other part of the section. *Ibid.*

6. The term "syrup," as used in ch. 557, Laws of 1907, and kindred statutes, designates articles of food which are in common use as table syrups, the products of sugar-producing plants, possessing natural characteristics of flavor, color, and viscidity which

make them acceptable as to quality and agreeable in taste, and hence desirable as articles of table food. Glucose in its pure and unmixed state is not such a syrup. *Ibid.*

7. The terms "glucose" and "corn syrup" are not synonymous in their trade meaning and use as applied to articles of table food; and the use of the term "corn syrup" as designating glucose or a mixture of glucose and syrup would naturally lead consumers into the belief that they were obtaining syrup of the kind commonly known as syrup, the product of sugar-producing plants, and hence such use of that term may be prohibited. *Ibid.*

FORECLOSURE. See EQUITY, 5. PLEDGE.

FOREIGN CORPORATIONS. See EMINENT DOMAIN, 1, 2. PROCESS.

FOREIGN STATUTES. See STATUTES, 2.

FORFEITURE. See TRUSTS AND TRUSTEES, 1.

FORGERY.

In a prosecution for forging a deed conveying land of another to defendant's wife, evidence that a bank to which, after the forgery, the wife mortgaged the land had voluntarily given a quitclaim deed to the owner without consideration, was admissible. *Kurowski v. State,* 210

FORMER JEOPARDY. See CRIMINAL LAW, 2–4.

FRAUD. See CANCELLATION OF INSTRUMENTS, 1, 2, 4. CONTRACTS, 17, 19, 22–26. EQUITY. MALICIOUS PROSECUTION, 3, 4. SPECIFIC PERFORMANCE, 1, 2.

FRAUDS, STATUTE OF.

See CORPORATIONS, 4, 5. SPECIFIC PERFORMANCE, 3.

The invalidity of a contract under the statute of frauds is a personal defense and is not available to one who is a stranger to the contract. *Draper v. Wilson,* 510

GROSS NEGLIGENCE. See ACTION, 5–7. NEGLIGENCE, 2, 5, 8, 9, 11, 13–21. TRIAL, 5.

GUARANTY.

Requisites and validity: Construction and operation.

1. In an action upon a contract of guaranty a complaint alleging that the plaintiff did "notify the defendant that the said plaintiff accepted the said guarantee and relied thereon," sufficiently alleges acceptance of and reliance on the guaranty. *Sentinel Co. v. Smith,* 377

2. A contract between a newspaper publishing company and an agent provided that it should continue for at least six months and that the agent should promptly pay every month for the papers sent him. By a contract of guaranty executed the same day, defendant agreed "to become responsible for the prompt payment of all bills for such papers to the amount of $500." *Held,* that the guaranty was not limited to payment for the first $500 worth of papers delivered, but was a continuing guaranty, binding defendant to pay for such papers as might be delivered during the life of the contract, not exceeding the sum named. *Ibid.*

3. The complaint herein is *held* to state a good cause of action upon a contract of guaranty. *First Nat. Bank v. Schellenberg,* 647

Discharge of guarantor.

4. In an action upon such guaranty the complaint need not allege that notices of the various defaults of such agent were given to defendant from time to time as they occurred. If notice was required, failure to give it was defensive matter to be set up in the answer. *Sentinel Co. v. Smith.* 377

5. The mere fact that the creditor continued to ship papers to the agent, notwithstanding he was in default in his payments after the first month, did not evince either bad faith or reckless conduct on the part of the creditor such as would bar a recovery against the guarantor. *Ibid.*

GUARDIAN AND WARD.

Accounting and settlement: Insane ward.

After the death of an insane ward an administrator of his estate must be appointed before the accounts of the guardian can be adjusted by the county court or the heirs of the ward can acquire title to his personalty. *Glasspoole v. McGuine,* 294

HEALTH. See FOOD.

HIGHWAYS.

Establishment. See DEDICATION, 6.

Regulation and use for travel: Injuries from defects and obstructions.

1. In an action against a town for personal injuries sustained on a highway, a complaint is *held* to show that the defects in the highway caused the injury. *Bell v. Lessor,* 557

2. Contributory negligence on the part of the driver being negatived by the jury, testimony tending to show that the accident happened substantially as alleged warranted a finding that the insufficiency of the highway was the proximate cause of the injury. *Ibid.*

3. Testimony of the town chairman that he was familiar with the place, having examined it about two days before the accident because he had been called upon to do so at that time, was sufficient to sustain a finding that the town had actual notice of the defects. *Ibid.*

4. Error, if any, in submitting to the jury through inadvertence the question whether insufficiency of the highway was *a* proximate cause of plaintiff's injury, is not ground for reversal, where the full and accurate charge to the jury conclusively shows that they were not misled by the form of the question. *Ibid.*

HOMICIDE.

If one points a loaded gun and discharges it in a direction other than at a person who is in fact killed by the bullet reaching his person, glancing from another object, that one is yet guilty of a homicidal offense, if he knew, or ought reasonably to have known, that his conduct was dangerous to human life and yet he acted regardless thereof. *Oborn v. State,* 249

HUSBAND AND WIFE. See WITNESSES, 2.

IMMUNITY. See CRIMINAL LAW, 2–4. INSANE PERSONS, 4–7. MALICIOUS PROSECUTION.

IMPEACHMENT. See WITNESSES, 5–7.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 4–9.

INDICTMENT AND INFORMATION.

1. An indictment against a sheriff charging that, by false pretenses in presenting a bill against the county for board of pretended prisoners who were not in fact in his custody during the time covered by the bill, he "did *induce* said M. county to pay" to him a specified sum of money, is not defective as failing to allege that defendant actually *obtained* the money. *State v. Brown*, 405
2. Certainty to a common intent is all that is required in charging an offense in an indictment, under the rule prevailing in this state; and such certainty is attained by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one. *Ibid.*
3. The letter as well as the spirit of our statute law is against the application of strict technical rules to the construction of indictments or informations, particularly where the defendant is deprived of no substantial right by the adoption of a more liberal rule of construction. *Ibid.*
4. In an indictment against a sheriff for false pretenses alleged to have been made to the county in presenting a false bill for board of pretended prisoners, it was not necessary to name the individual officers of the county to whom the false pretenses were made, since the statute prescribes the officer with whom a claim must be filed, the body that must audit the bill, the officers who must sign the warrant, and the one charged with its payment. *Ibid.*
5. It is not a valid objection to such an indictment that it fails to show that all the formalities prescribed by sec. 677, Stats. (1898), were observed in relation to the preparation, verification, and filing of the claim. If the false pretenses made were calculated to and did deceive the county, so that it parted with its money to defendant, that is sufficient. *Ibid.*
6. An information under sec. 4405, Stats. (1898), charging the wilful burning of insured property with intent to defraud the insurer, need not allege that the insurer was authorized to do business in this state. The gravamen of the offense being the wilful burning with intent to recover the insurance, the accused may be convicted notwithstanding invalidity of the policy, if he believed it to be valid. *Parb v. State*, 561

INFANTS. See JUDGES, 2. WILLS, 20, 23. WITNESSES, 1.

INFORMERS. See MALICIOUS PROSECUTION, 2, 3.

INHERITANCE TAX. See TAXATION, 7–11.

INJUNCTION.

Grounds. See ACTION, 2. ADVERSE POSSESSION, 2, 4. EMINENT DOMAIN, 3. JUDGMENT, 4, 5. TRUSTS AND TRUSTEES, 3.

No rule of law or equity forbids the court to entertain a suit to enjoin the acts of public officers injurious to the plaintiffs, attempted to be done under an invalid ordinance or statute. *Lutien v. Kewaunee*, 242

INNUENDO. See LIBEL, 2, 3.

INSANE PERSONS.

Guardianship. See GUARDIAN AND WARD.

Crimes. See CRIMINAL LAW, 6. INSTRUCTIONS TO JURY, 3.

1. Whether evidence of conduct of a person after the fact, in a criminal prosecution, is admissible on the question of whether such person was legally sane at the time of such fact, depends upon whether such conduct bears such relation to such person's former condition of mind as, in reason, to be worthy of consideration in respect thereto. *Oborn v. State,* 249
2. If the question of fact last suggested is decided in favor of admissibility, then the, rather miscalled, discretionary power, which is, really under the circumstances, power to judge as to the fact, is exhausted and there is no discretion as to whether to allow or not to allow the evidence; it is admissible as matter of right. *Ibid.*
3. The term "insanity," in the law, means such an abnormal condition of the mind, from any cause, as to render the afflicted one incapable of distinguishing between right and wrong in the given instance and so rendering him unconscious of the punishable character of his act. *Ibid.*
4. A person is not immune from punishment for a wrongful act if he has, at the time of perpetrating it, capacity to distinguish between right and wrong in respect thereto,—if he has such capacity and is conscious of the wrongfulness of his conduct. *Ibid.*
5. The law does not recognize a form of insanity in which there exists capacity to distinguish between right and wrong and consciousness of the wrongful nature of the particular act, without power to abstain from it; *i. e.* in law he who can distinguish between right and wrong must, at his peril, choose rightly between them. *Ibid.*
6. Proof of epilepsy does not, necessarily, directly establish insanity, as epilepsy is not, as a matter of fact or law, insanity, though evidence of an epileptic condition may bear, circumstantially, on the mental condition of the afflicted person to the extent of establishing insanity. *Ibid.*
7. Whether the accused, in any given case, was afflicted with epilepsy, and if so whether the affliction was a mental disease or had impaired his mind, and if so whether sufficiently to render him unable to appreciate between right and wrong, are matters of fact to be established by evidence. *Ibid.*

INSOLVENCY. See CONTRACTS, 19.

INSTRUCTIONS TO JURY.

Form, requisites, and sufficiency. See ACTION, 7. DAMAGES, 2. HIGHWAYS, 4. INTOXICATING LIQUORS, 2. NEGLIGENCE, 19. RAPE, 2. WATERS AND WATERCOURSES, 2, 3.

1. The fact that portions of a charge to the jury (in this case as to the preponderance of evidence and as to damages for future suffering) were not as clear and concise as they might have been, is not ground for a reversal if they were not misleading. *Suess v. J. S. Stearns Lumber Co.* 609

Requests for instructions.

2. A party cannot complain that other instructions ought to have been given, even if necessary, where he made no request therefor. *Suess v. J. S. Stearns Lumber Co.* 609

Insanity.

3. It is not improper to say, according to the facts, in instructing a jury, that experts have given their opinions as to the sanity of the accused, leaving it to the jury to find the truth of the matter without being necessarily bound by the opinion evidence. *Oborn v. State,* 249

Ordinary care.

4. An instruction that ordinary care on the part of the driver would be "such a degree of care and caution, all things considered, that a reasonably prudent man would have exercised," omitting the words "under the same or similar circumstances," was not prejudicially erroneous where the standard definition of ordinary care was given in connection with a question in the special verdict dealing with the negligence of the defendant. *Swalm v. Northern Pacific R. Co.* 442

Reasonable doubt.

5. If the court instructs the jury in a criminal case that they should acquit the defendant unless they become satisfied by the evidence beyond every reasonable doubt that he is guilty, that sufficiently informs them that each juror should pass his own judgment on the evidence and not agree with his fellows to a conviction unless he is convinced, with the certainty mentioned, that the accused is guilty. *Oborn v. State,* 249

Special verdict.

6. A refusal to give a correct requested instruction, as to a question in the special verdict, that unless the jury were satisfied from a preponderance of the evidence that it should be answered "Yes" they should answer it "No," was not prejudicial error, where the jury were instructed that their answers to all the questions should be in accordance with what they believed to be the fair weight of the whole evidence, and, as to the particular question, that if they so affirmatively believed from the whole evidence they should answer the question accordingly, and if they were not so satisfied they should give the opposite answer. *Hendrickson v. Wisconsin Central R. Co.* 179

INSURANCE.

LIFE. See BANKRUPTCY. TAXATION.

FIRE.

Policy: Cancellation.

1. One party to a policy of insurance can cancel it only by strictly complying with its terms as to cancellation, unless such compliance is waived by the other party. *Northern P. C. Co. v. Liverpool & L. & G. Ins. Co.* 433

2. Where by the terms of a fire policy the insurer could cancel it without the consent of the insured, only as to risks subsequent to the expiration of ten days after notice of cancellation, no cancellation by mutual consent or otherwise than in accordance with the terms of the policy was shown by a letter from an agent stating that upon instruction from the insurer he had

that day canceled the policy and credited the insured with the return premium, and a reply acknowledging receipt of the notice asking if the policy could not be rewritten in one of the agent's other companies, and asking for details of the policy. *Ibid.*

Estoppel, waiver, or agreements affecting right to avoid or forfeit policy: Provision that all owners must be named.

[3. A fire insurance policy provided that "all property must be insured in the names of all the owners, and the application must state the name of each owner or the policy will be void." Whether it was a violation of that provision to obtain insurance in the name of the widow alone, upon property which had descended to children of an intestate subject to the dower and homestead rights of the widow, not determined.] *Siemers v. Meeme Mut. Home Protection Ins. Co.* 114

4. Knowledge on the part of the secretary of the insurance company, when writing the policy, of the actual state of the title, was an effectual waiver of the foregoing provision of the policy. *Ibid.*

Same: Increase of hazard.

5. A finding by the jury that removal of the spark-arrester and the subsequent operation of a steam engine for a few minutes without such arrester did not materially increase the risk of fire, is sustained in this case by the evidence, in which there was nothing to show that the removal of the arrester was the proximate cause of the fire. *Siemers v. Meeme Mut. Home Protection Ins. Co.* 114

6. A clause in a policy insuring farm buildings, to the effect that "if the risk should be increased by any means whatever within the control of the assured, or be occupied in any way whatever so as to render the risk more hazardous," the insurance should be void, was not violated by the use on the premises, and within sixty feet of a barn in which the fire started, of a steam engine for the purpose of cutting ensilage. *Ibid.*

7. Insurance must be presumed to be made with reference to the character of the property insured and to cover risks incident to its use in the ordinary way; and the clause above quoted has reference to some permanent change in the character or condition of the insured property, not to a temporary change in the risk which is a mere incident to its ordinary use. *Ibid.*

8. A clause in a fire insurance policy providing that the insurer shall not be liable for loss caused by the use of steam threshing machines unless certain specified precautions are taken, does not prohibit the use of steam thresher engines except for threshing, nor on the other hand does it permit their use for other purposes without taking those precautions. *Ibid.*

Same: Duty as to saving property.

9. A provision in the policy that "in case of fire . . . or exposure to loss or damage thereby" the insured shall use their best endeavors for saving and preserving the property, defines the duty of the insured after the property covered by the policy is on fire or menaced by a fire in its vicinity, and has no reference to acts or omissions preceding the fire. *Siemers v. Meeme Mut. Home Protection Ins. Co.* 114

Evidence.

10. In an action upon an insurance policy for the amount of a loss sustained by fire, where no fraud in the causation of the fire

was charged, evidence that plaintiff had suffered a fire of small amount about a year prior to the one in question was properly excluded. *Capelle v. Royal Ins. Co.* 78

INTERSTATE COMMERCE. See FOOD, 1–4.

INTOXICATING LIQUORS.

1. Upon the conflicting evidence in this case as to whether the beverage sold by defendant on Sunday was beer or ginger ale, the question was one for the jury and their finding should not be disturbed. *Olson v. State,* 413
2. Such question, in view of admitted facts, was the only question in issue, and the jury were properly so instructed. *Ibid.*
3. The proprietor of a saloon whose barkeeper sells liquor therein on Sunday is guilty of a violation of sec. 1564, Stats. (1898), even though the sale was contrary to his positive instructions. *Ibid.*

ISLANDS. See ADVERSE POSSESSION, 2.

JEOPARDY. See CRIMINAL LAW, 2–4.

JOINDER.
Of causes of action. See ACTION, 1, 3–17. CORPORATIONS, 2. NEGLIGENCE, 9, 13–17.
Of parties. See PARTIES.

JOINT TORTFEASORS. See CANCELLATION OF INSTRUMENTS, 4. NEGLIGENCE, 12. PARTIES.

JUDGES.

Disqualification to act.
1. Orders made in violation of sec. 2579, Stats. (1898), are absolutely void and hence subject to collateral attack. *McIntosh v. Bowers,* 74
2. As to the interests of minor parties in such a case there could be no consent to the making of an order by a disqualified judge. *Ibid.*

JUDGMENT.

Conclusiveness of adjudication. See APPEAL, 1.
1. While a final judgment is conclusive as to issues arising on the pleadings which were or might have been litigated, it does not, in itself, necessarily determine what was litigated or how each particular question was decided; and the facts in that regard may be shown by the findings, by the verdict, by the bill of exceptions, or by extrinsic evidence. *Gerbig v. Bell,* 157
2. Thus, in an action for trespass to land, where defendant denied plaintiff's ownership and the jury found that plaintiff owned the land but that defendant did not trespass thereon, a judgment dismissing the complaint would not have the effect to deprive the plaintiff of his land, but on the contrary would be conclusive as to his ownership; and such judgment in the case would be proper. *Ibid.*
3. A judgment of divorce, so far as *in rem,* is conclusive on the whole world as to the status of the parties being, from that time, single as to each other, but does not settle the status of their prior relations so as to render them, as to the whole world,

valid regardless of whether they were so in fact or not. *Oborn v. State,* 249

4. A decision of the supreme court, in an action by a landowner against two railroad companies, one the lessee of the other, to enjoin them from using his land for railroad purposes, to the effect that they are trespassers upon the land and that the circuit court erred in permitting them to occupy the same before acquiring a right thereto by proper condemnation proceedings, is *res judicata* between the parties and binding upon such lessee even after it has acquired the title and franchises of its lessor by deed from the latter and has instituted new condemnation proceedings against the property in its own name. *Great Northern R. Co. v. McCord,* 589

5. In such case neither company acquired any claim or color of title to the premises under the order of the circuit court, and subsequent steps taken by the grantee to obtain a new certificate of convenience and necessity from the railroad commission and to condemn the land cannot, therefore, be treated as having been instituted to perfect a defective title, so as to entitle it to a stay of proceedings in the landowner's action to enjoin the further use of the premises, and to an order permitting it to continue its occupancy pending the condemnation proceedings, under the provisions of sec. 1852, Stats. (1898). *Ibid.*

JURY.

Right to trial by jury. See CRIMINAL LAW, 11, 12.

The constitutional guaranty of trial by jury and the statute as well entitle one, charged with having committed a criminal offense, to a trial by a jury of twelve men selected according to law, from the county where the crime is claimed to have been committed, and to have all issues, including that of insanity, tried in such county and by the one jury. *Oborn v. State,* 249

Custody and conduct. See CRIMINAL LAW, 7–9.

LACHES. See CONTRACTS, 22.

LAND CONTRACTS. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Surrender.

1. Where a voluntary surrender of leased premises is accepted by the landlord, all liabilities under the lease which would arise in the future had no surrender taken place are terminated, but liabilities which have already accrued remain unaffected. *Boyd v. Gore,* 531

Eviction.

2. Where the landlord had objected to a tenant remaining on a farm, because the latter got into debt, and had told the tenant that he would better leave because he could not carry on the place, acquiescence and removal by the tenant and acceptance and resumption of possession by the landlord do not show an eviction, but a voluntary surrender. *Boyd v. Gore,* 531

Rent: Use and occupation.

3. Sec. 2196, Stats. (1898), permitting recovery by a landlord for the use and occupation of lands or tenements under any agreement

not made by deed, requires that there must be an agreement express or implied. *Munkwitz R. & Inv. Co. v. Milwaukee,* 230

4. Where a city after conveying certain premises continued to use and occupy them without any agreement, express or implied, to pay rent, the grantee cannot recover for such use and occupation. *Ibid.*

[5. Whether in such a case the city could be bound by an implied contract to pay rent, not determined.] *Ibid.*

LEADING QUESTIONS. See TRIAL, 3.

LEGISLATURE. See CONSTITUTIONAL LAW, 1, 2, 4, 6.

LIBEL AND SLANDER.

1. Words published in a newspaper concerning the appearance of plaintiff (a brewer) before a city council to oppose the revocation of the liquor license of a third person, in which it was suggested, among other things, that plaintiff was interested in the matter contrary to "the law that brewers cannot take out a license to run a saloon," and that the brewing company dominated the council on that occasion and was "bigger than the entire city government," and which also stated that John Barleycorn was "bigger than the entire city government," are *held* not libelous. *Ruhland v. Cole,* 367

2. A statement in such publication with reference to the proceeding before the council that "the wheels of government stopped to oil up again for another session of the trial," is *held* not capable of the meaning ascribed thereto by innuendo that plaintiff had corruptly influenced members of the council. *Ibid.*

3. In libel the alleged defamatory words must be capable of the meaning ascribed to them by the innuendo. *Ibid.*

4. A publication falsely charging one with having caused warrants to be issued for persons summoned as witnesses in a proceeding for the revocation of a retail liquor dealer's license with the intent to intimidate such witnesses and so deter them from testifying, is libelous. *Ibid.*

5. Editors or publishers in their newspapers may take part in the discussion or debate of public matters with the same freedom as other citizens. *Ibid.*

6. In newspaper publications concerning matters of public interest, untruthful accusations of crime or untruthful insinuations of criminal conduct, or untruthful or scandalous or defamatory expressions tending to subject the person written of to public ridicule, hatred, or contempt, are libelous. *Ibid.*

LIENS. See CONTRACTS, 26.

LIFE INSURANCE. See BANKRUPTCY. TAXATION, 11.

LIFE TENANT. See WILLS, 23.

LIMITATION OF ACTIONS. See PLEADING, 4, 5.

LOCAL SELF-GOVERNMENT. See CONSTITUTIONAL LAW, 6.

LOGS AND TIMBER. See TRESPASS, 1–3.

MALICIOUS PROSECUTION.

See APPEAL, 10.

Probable cause: Malice: Advice of attorney.

1. If one before instituting a criminal prosecution states to a duly licensed attorney at law, fully and fairly, all the facts and cir-

cumstances within his knowledge or of which he has reasonably reliable information, and acts upon the advice of such attorney respecting whether such facts render the defendant guilty of a criminal offense, he has, in the legal sense, probable cause for his action rendering him immune from liability for malicious prosecution. *Topolewski v. Plankinton Packing Co.* 52

2. The foregoing rule applies liberally to informers, in that the attorney consulted need not necessarily be the public prosecutor, and the term "full and fair statement of all the facts" does not call for all facts reasonably discoverable, or require the informer to make diligent inquiry in respect thereto. *Ibid.*

3. In case of a criminal prosecution being commenced upon the initiative of a private person, and the action being prosecuted to conviction and judgment, without collateral fraud, such judgment will stand as probable cause for such commencement, rendering such person immune from liability for malicious prosecution, though the judgment be reversed on appeal for error committed upon the trial; even error in holding that the facts claimed by such person to exist constituted guilt of the criminal charge. *Ibid.*

4. The fraud which will take a judgment of conviction out of the rule stated, is fraud extrinsic, not in respect to matters litigated and passed upon in the trial of the action. *Ibid.*

5. The maxim, "Every one is presumed to know the law," does not obtain literally and generally; it is limited by the reason for the rule, viz.: to prevent violators of the criminal code from escaping punishment on the ground of ignorance of the law and violators of private rights, escaping liability for actual loss thereby inflicted on such ground. *Ibid.*

6. If a person acts, in commencing a criminal prosecution, upon the advice of one duly licensed to practice the profession of law, and such advice proves to be wrong, he cannot be rightly held to have acted in bad faith because of a legal presumption that every one knows the law. *Ibid.*

7. The maxim, "Every one is presumed to know the law," does not prevail against the real truth as to any particular situation, except as regards punishment for a criminal offense, or responsibility for actual damages for violation of private rights. *Ibid.*

8. One who institutes a criminal prosecution upon the advice of counsel is bound to state to such counsel fully and fairly all the material facts within his knowledge relating to the offense. *Rogers v. Van Eps,* 396

9. Evidence that such full and fair statement was not made to the counsel upon whose advice the prosecution was begun, and that there was not probable cause to believe the accused guilty, is evidence of malice. *Ibid.*

MANDATORY STATUTES. See SCHOOLS AND SCHOOL DISTRICTS, 4.

MASSES. See WILLS, 5, 7, 8, 12.

MASTER AND SERVANT.

The relation: Creation and existence.

1. Where a person who was assisting the conductor of a railway train to repair a brake on a car, but who had not been employed by the conductor under any express authority or because of any

sudden emergency necessitating his employment, was injured by negligence of the engineer, the railway company cannot be held liable on the theory that the injured person was its servant. *Hendrickson v. Wisconsin Central R. Co.* 179

Master's liability for injuries to servant: Machinery.

2. Evidence as to the worn and defective condition of a ratchet wheel and dog on defendant's pile-driver, by reason of the slipping or premature release of which a pile fell and injured plaintiff, is *held* to sustain a finding by the jury that defendant was guilty of a want of ordinary care. *Holland v. Barnett & Record Co.* 446

3. Upon conflicting statements by the engineer who operated the pile-driver that he could not account for the happening of the accident and that it was caused by a motion of his foot releasing the dog from the ratchet wheel, it was for the jury to say whether or not the accident was so caused. *Ibid.*

4. In an action by an employee in a paper mill whose hand was caught and crushed between two rolls, one of which he was cleaning by applying a cloth to it after he had started the machine for that purpose, it is *held* upon the evidence that neither the alleged negligence in failing to warn plaintiff that the speed of the rolls was for a few seconds gradually accelerated after the machine started, nor any other negligence of defendant, had any causal relation to the injury, and also that plaintiff was guilty of contributory negligence in operating the machine as he did. A verdict for defendant should therefore have been directed, or the answers in a special verdict finding defendant negligent should have been changed by the court. *Thompson v. American W. P. Co.* 598

Same: Safe place to work. See RAILROADS, 1–3. TRIAL, 9.

5. In an action for personal injuries caused by the bursting of a steam cylinder near which plaintiff was working, evidence which would justify the jury in finding that the cylinder burst because, by reason of having been twice rebored, the shell was too thin, rather than because of a latent defect therein caused by a sand hole, was sufficient to sustain findings that the employer was negligent and that such negligence was the proximate cause of the injury. *Suess v. J. S. Stearns L. Co.* 609

Same: Explosion of gas.

6. In an action for personal injuries to an employee, under the facts, stated in the opinion, the jury were justified in finding that defendant was negligent in permitting the explosive gas to be and remain in the evaporator. *Buggs v. Rock County S. Co.* 462

7. From the fact that an explosion took place under such circumstances the jury were authorized to infer that it was an explosion of gas and that it was preceded by ignition or any of the ordinary causes of explosion. *Ibid.*

8. It was not essential to the liability of defendant that the cause of ignition should be shown so long as it appeared that it was not caused by any negligence of the plaintiff. *Ibid.*

Same: Warning servants. See MASTER AND SERVANT, 4.

Same: Fellow-servants.

9. A distinct and independent employee of an electric light and power company to whom is delegated the duty to disconnect

and make safe the wires on which other employees must work is ordinarily a vice-principal, and not a fellow-servant with the linemen and other like workmen. *Massy v. Milwaukee E. R. & L. Co.* 220

10. The question whether or not employees of a common master are fellow-servants does not depend upon the rank or grade of the negligent servant, but upon the nature or character of the act in the performance of which the injury was incurred. *McKillop v. Superior Shipbuilding Co.* 454

11. A pile-driver crew and their foreman engaged in the common employment of taking down and removing a pile-driver were fellow-servants so that the employer was not liable for an injury to one of the crew caused by the foreman's negligence, stated in the opinion. *Holloway v. H. W. Johns-Manville Co.* 135 Wis. 629, distinguished. *Ibid.*

Master's liability for acts and omissions of servant. See INTOXICATING LIQUORS, 3.

MAXIMS.
Caveat emptor, 39.
Caveat venditor, 39.
Ignorantia legis neminem excusat, 72.
Judicia posteriora sunt in lege fortiora, 259.
Mobilia sequuntur personam, 520.
Res judicata pro veritate accipitur, 598.
Respondeat superior, 187.
Stare decisis, 483.

MENTAL CAPACITY. See EVIDENCE, 1. RELEASE, 3–5. WILLS, 1.

MISDEMEANORS. See CRIMINAL LAW, 1.

MORTGAGES. See VENDOR AND PURCHASER.

MUNICIPAL CORPORATIONS.

Territorial extent: Annexation.

1. An averment in a complaint that an ordinance of annexation "was not published in accordance with law" states a legal conclusion. *Lutien v. Kewaunee,* 242

2. An averment that in making such annexation the city authorities acted upon a petition which was not signed by a majority of the electors and the owners of one third of the taxable property in the district sought to be annexed according to the last tax roll including that district, sufficiently asserts that the annexation was unauthorized. *Ibid.*

3. The proper remedy in such case is a class action in equity by the property holders and taxpayers in the territory sought to be annexed. *Ibid.*

Legislative control of municipalities. See CONSTITUTIONAL LAW, 4–6.

Property. See DEDICATION.

Public improvements: Special assessments: Constitutionality of statutes.

4. Sec. 959—35, Stats. (1898), as amended by ch. 329, Laws of 1909, limiting the amount to be assessed against the abutting property owner for the cost of street paving constructed on a con-

crete foundation, is not unconstitutional as an attempted unlawful delegation to cities of the power to exempt property from taxation. The classification of permanent pavements on a concrete foundation is a valid classification, and the class may properly be made the subject of special and peculiar legislation, notwithstanding that in some isolated and infrequent cases inequality may result. *Weise v. Green Bay,* 198

5. The provision of the statute requiring that a lotowner who exercises the option to have the assessment against his property spread over a term of years must agree that he will make no objection to any want of power or irregularity in the making of the assessment, and making the bonds issued in pursuance of the option conclusive evidence of the validity of the proceedings, is not open to any constitutional objection as being unreasonable and in effect a taking of property without due process of law. The option is a privilege which the legislature could extend or not as it chose, and which, if extended, could be made subject to such conditions as legislative discretion approved. *Ibid.*

6. The operation of said sec. 959—35 is not confined to those cities which have special provisions in their charters exempting property which has once been assessed for construction of a pavement, from any subsequent assessments, but is general in its character and extends to all cities to which the act as a whole applies. *Ibid.*

Same: Amendment and construction of statutes.

7. Ch. 539, Laws of 1909, passed eight days after the act amending said sec. 959—35 (ch. 329, Laws of 1909), though containing some general expressions which, in the absence of other statutes *in pari materia,* would indicate an intent that assessments for paving might be made to any amount against adjoining property, must, in view of the closeness in point of time of the two enactments, and the provision of sec. 2 of said ch. 539 that it should not be construed as repealing any provisions of the statutes, be construed as subject to the limitation of said sec. 959—35 as amended. *Weise v. Green Bay,* 198

Same: Estoppel.

8. The evidence in this case is *held* to sustain findings by the trial court to the effect that in the making of certain special assessments for street improvements all requirements of the city charter of Milwaukee were complied with. *Spence v. Milwaukee,* 47

9. The lotowners having had notice of the proceedings resulting in the assessments upon their lots, and the property having been enhanced in value far more than the cost of the improvements, and the owners severally benefited to the amount of the benefits assessed, they are estopped from maintaining an action, commenced after the completion of the work, to set aside the assessments. *Ibid.*

Fiscal management: Diversion of moneys raised for specific purposes.

10. Moneys raised by taxation for a specific purpose constitute a fund "appropriated by law" for that special purpose, within the meaning of sec. 925—122, Stats. (1898), and the council of a city of the third class, operating under the general charter law, cannot

lawfully transfer such fund even temporarily to the general fund or any other city fund. *Weik v. Wausau,* 645

11. Irrespective of special statutory provisions, a fund raised by a city for a special purpose is a trust fund, and equity will in a proper case interfere to prevent its diversion. *Ibid.*

NAVIGABLE WATERS. See ADVERSE POSSESSION, 2.

NEGLIGENCE.

Definitions.

1. The basic feature of the law of actionable negligence is as declared during the first year of this court's history and since steadily and firmly adhered to. *Astin v. Chicago, M. & St. P. R. Co.* 477

2. The basic feature above referred to is this: There are three degrees of negligence, viz.: *slight*—an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use; *ordinary*—failure to exercise in any given situation such care as the great mass of mankind ordinarily exercise under the same or similar circumstances; and *gross*—failure to exercise any care to avoid inflicting injury to the person or property of others; recklessly or wantonly acting or failing to act to avoid such injury, evincing such utter disregard of consequences as to suggest a willingness, substantially equivalent to intent, to injure, and denominated such, constructively, and classible with actual intent as regards duty to compensate for the injury. *Ibid.*

3. The first degree is characterized by such slight inadvertence that in case of its being the fault of the injured, it does not militate against his recovering for his loss, and in case of its being the fault of the injurer the result is *damnum absque injuria.* *Ibid.*

4. The second degree is characterized by inadvertence of the nature indicated in No. 2, and injuries proximately resulting to the person or property of another, and not proximately contributed to by that other's want of ordinary care, are actionable. *Ibid.*

5. The third degree is not characterized by inadvertence, in the lexical sense, at all, but rather by absence of it; while in the first and second degrees it must be present and dominant. *Ibid.*

6. There are no sub-degrees within the first and second mentioned. Want of ordinary care within the field of inadvertence is of no greater dignity if considerable than if little, so long as it is proximate, in a legal sense, to the injury. *Ibid.*

7. The rule logically follows that an injury to a person, proximately caused by failure of another to exercise ordinary care for that person's safety, and proximately contributed to by such person's want of ordinary care, however slight—is not actionable, comparative effects of such want of care not being recognized in our system. *Ibid.*

8. In case of the personal or property rights of a person being physically injured by gross negligence of another, that other is liable to such person for the pecuniary loss resulting naturally and ordinarily therefrom, regardless of any want of ordinary care on the part of such person contributing thereto. *Ibid.*

9. Gross negligence does not, to any extent, include ordinary negligence. So a charge in a complaint confusing the two, renders

the pleading indefinite and uncertain and it should be construed, if practicable, as alleging either the one or the other and the trial restricted accordingly. *Ibid.*

Acts and omissions constituting negligence. See ACTION, 6. FIRES. HIGHWAYS. INSURANCE, 5–8. MASTER AND SERVANT. RAILROADS. RELEASE. TRIAL, 6. WATERS AND WATERCOURSES.

Same: Condition and use of land.

10. A private contractor who places material on the right of way of a railway company owes to the railway employees the duty to use ordinary care in so placing such material that it will not be dangerous to them while riding on cars and engines in the manner in which they ordinarily ride in the performance of their duties. *Cummings v. C. W. Noble Co.* 175

Same: Slight negligence. See NEGLIGENCE, 2, 3, 7.

Same: Ordinary or gross negligence? See ACTION, 5–7. NEGLIGENCE, 2, 4, 5, 8, 9, 13–21. TRIAL, 5.

11. The same act cannot constitute both ordinary negligence and gross negligence, the two being separate and distinct legal wrongs, one involving inadvertence and the other involving at least a sufficient degree of intent to be inconsistent with inadvertence. *Haverlund v. Chicago, St. P., M. & O. R. Co.* 415

Same: Liability of joint tortfeasors.

12. A contractor whose breach of such duty caused an injury to a railway employee is not relieved from liability therefor by the fact that the railway company was also negligent by reason of its assent to the contractor's act or its failure to remove the danger. *Cummings v. C. W. Noble Co.* 175

Proximate cause. See HIGHWAYS, 2, 4. INSURANCE, 5. MASTER AND SERVANT, 4, 5.

Contributory negligence. See HIGHWAYS, 2. MASTER AND SERVANT, 4. RAILROADS, 2.

Actions: Causes of action: Joinder: Election.

13. A cause of action sounding in ordinary negligence, is one thing, and a cause of action sounding in gross negligence is another. Both cannot characterize a single circumstance of a person being injured by another. *Astin v. C., M. & St. P. R. Co.* 477

14. Such two causes of action, in form as characterizing a single circumstance of a person being injured by another, satisfy subd. 1, sec. 2647, Stats. (1898), in that they arise out of the same transaction, and satisfy subd. 3 of such section, in that they are both injuries to person or property. *Ibid.*

15. The two causes of action are not inconsistent in the sense that the choice of one absolutely waives the other. *Ibid.*

16. In circumstances rendering it difficult to determine which of such two causes of action is available, the doctrine of election does not apply, in this, the good-faith unsuccessful assertion of one does not necessarily prejudice asserting the other. *Ibid.*

17. By necessary implication, causes satisfying the letter of subd. 1 or subd. 3, sec. 2647, Stats. (1898), must also have the element of consistency to the extent that the choice of one does not create a waiver of opportunity to turn to the other. *Ibid.*

Same: Pleading.

18. One who has suffered injury from actual misconduct of another but does not know whether such misconduct constituted ordinary negligence or gross negligence, may set out the wrongful act in different counts alleging different causes of action, for the purpose of meeting the different and conflicting inferences that may reasonably be drawn from the evidence adduced. *Haverlund v. Chicago, St. P., M. & O. R. Co.* 415

19. If in such case the evidence or the reasonable inferences therefrom be so conflicting as to require that a jury determine which of the alleged causes of action, if any, is sustained thereby, the trial court should inform them of their duty to determine this question and require them to find which cause of action, if any, has been established. *Ibid.*

20. If a person grounds an action to recover for a personal injury on ordinary negligence alone, he cannot, without amending his pleading, recover on the ground of gross negligence. *Astin v. Chicago, M. & St. P. R. Co.* 477

21. If a person grounds an action to recover for a personal injury on gross negligence alone, he cannot, without amending his pleading, recover on the ground of ordinary negligence. *Ibid.*

NEWSPAPERS. See LIBEL AND SLANDER, 5, 6.

NEW TRIAL. See ADVERSE POSSESSION, 3, 4.

NOTICE.

Of defect. See HIGHWAYS, 3.
Of matters of record. See CONTRACTS, 21.
Of rights of person in actual possession of land. See VENDOR AND PURCHASER.

OFFICERS. See CONSTITUTIONAL LAW, 3–6. COUNTIES, 1, 2. STATUTES, 1.

OPINION EVIDENCE. See EVIDENCE. INSTRUCTIONS TO JURY, 3.

OPTIONS. See CORPORATIONS, 4, 5.

ORDINARY CARE. See INSTRUCTIONS TO JURY, 4. MASTER AND SERVANT, 2. NEGLIGENCE, 10, 11. RAILROADS, 5. TRIAL, 5–7. WATERS AND WATERCOURSES, 2, 3.

PAROL EVIDENCE. See CONTRACTS, 1–15. CORPORATIONS, 5.

PARTIES.

Real party in interest. See ASSIGNMENTS. TRUSTS AND TRUSTEES, 2.

Proper parties. See CORPORATIONS, 3.

Joinder. See PLEADING, 2.

One of a number of joint tortfeasors may be sued alone without joining the others, each being responsible for the whole wrong. *Helberg v. Hosmer,* 620

PERPETUITIES. See WILLS, 15.

PERSONAL INJURIES. See DEATH. HIGHWAYS. INSTRUCTIONS TO JURY, 4. MASTER AND SERVANT. NEGLIGENCE. PLEADING, 1. RAILROADS, 1–5. RELEASE. TRIAL, 5.

PLATS. See DEDICATION.

PLEADING.

Complaint. See ACTION, 1, 2, 4–7. CANCELLATION OF INSTRUMENTS, 5, 6. CONTRACTS, 17, 25. CORPORATIONS, 1–3. DEATH, 1, 2. GUARANTY, 1, 3. HIGHWAYS, 1. INDICTMENT AND INFORMATION. MUNICIPAL CORPORATIONS, 1, 2. NEGLIGENCE, 9, 18–21. RELEASE, 1. TRUSTS AND TRUSTEES, 4.

1. In an action against a contractor for an injury caused by his piling timbers near a railway track, a complaint showing that the timbers were placed in such dangerous position before the accident and that they caused it need not state more definitely when they were so placed. *Cummings v. C. W. Noble Co.* 175

Answer. See GUARANTY, 4. RELEASE, 1.

Counterclaim. See SETOFF AND COUNTERCLAIM.

Demurrer.

2. A general demurrer to a complaint by one of two defendants, on the ground that no cause of action is stated against him, does not raise the question of misjoinder of parties or causes of action. *Cummings v. C. W. Noble Co.* 175

3. The test of a complaint on demurrer thereto for insufficiency, is not whether it states the precise cause of action intended, or the pleader appreciated the nature of his remedy, or asked for appropriate relief, but whether the facts stated expressly and inferentially, giving to the language the benefit of all reasonable intendments, show the plaintiff to be entitled to some judicial relief. *Hall v. Bell,* 296

Same: Oral demurrer.

4. An oral demurrer to a complaint does not raise the objection that the cause of action is barred by limitation. *Lutien v. Kewaunee,* 242

5. Where it appears on the face of the complaint that the cause of action is so barred, and the statute of limitation is pleaded in the answer, the appellant is not prejudiced by the ruling sustaining an oral demurrer and dismissing the complaint. In such case the judgment will be affirmed, with leave to the plaintiff to apply to the court below to amend his complaint and plead other facts, if any exist, in avoidance of the bar of the statute. *Ibid.*

Amendment. See NEGLIGENCE, 20, 21.

Variance. See ACTION, 3. CORPORATIONS, 2.

PLEDGE.

Foreclosure.

If a person holds personal property as pledgee or rightfully, as security, he may enforce his right in that regard by foreclosure in equity, regardless of any legal or summary remedy he may have. *Hall v. Bell,* 296

POLICE POWER. See FOOD, 1–4, 7.

POSSESSION. See ADVERSE POSSESSION. SPECIFIC PERFORMANCE, 1. TRESPASS, 4. VENDOR AND PURCHASER.

PRESUMPTIONS. See ADVERSE POSSESSION, 1. APPEAL, 9.

PRINCIPAL AND AGENT. See BROKERS, 1. CORPORATIONS, 10–13. GUARANTY, 2.

PRINTED CASE. See COSTS, 3–5.

PROCESS.

Service on agent: Vacating service. See COURTS, 3, 4.

1. Where a complaint by one foreign corporation against other foreign corporations for a conspiracy to ruin its business, charges one of the principal overt acts of the conspiracy, from which great damage is alleged to have resulted, to have been committed within this state, a substantial part at least of the cause of action arises within this state and, under subd. 15, sec. 2637, Stats. (1898), the summons may be served upon any agent of a defendant corporation having charge of or conducting any business for it in the state. *Petition of Pierce-Arrow Motor Car Co.* 282

2. Whether or not an agency was in fact created by a contract between a foreign automobile company and an individual or corporation within this state, which does not in terms designate the latter as agent, but provides for the sale to him or it of a certain number of automobiles at specified prices, prescribes certain territory within which such party shall have the exclusive right of sale, and contains other stipulations in regard to credits on repairs ordered, the supply of advertising matter, diligence on the part of the dealer in furthering sales, non-contest of patents, etc., so that service upon such dealer would bind the foreign corporation, not decided. TIMLIN, SIEBECKER, and KERWIN, JJ., in dissenting opinion, take the view that such a contract is one of sale and not of agency. *Ibid.*

3. An order denying an application to vacate the service of a summons on a foreign corporation on the ground that the person served was not an agent upon whom service was authorized, is not appealable, nor is it reviewable upon appeal from the final judgment if the defendant appears and defends upon the merits. *Ibid.*

PROXIMATE CAUSE. See HIGHWAYS, 2, 4. INSURANCE, 5. MASTER AND SERVANT, 4, 5.

PUBLIC CHARITIES. See WILLS, 7.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 4–9.

PUBLIC RECORDS. See COUNTIES, 5.

PUBLIC SQUARES. See DEDICATION, 1, 5–8.

PUBLIC TRUSTS. See TRUSTS AND TRUSTEES, 2.

PUNITORY DAMAGES. See DAMAGES.

RAILROADS.

Right of way: Condemnation. See EMINENT DOMAIN.

Operation: Injuries to persons on or near tracks. See NEGLIGENCE, 10, 12.

1. A foreman employed by a granite company at its quarry, whose duty included attending to the reception and placing on a spur track of the cars which were to be loaded at the quarry, and who, while performing such duty in connection with a switching crew of the railway company, undertook with the conductor's consent to assist in repairing the brake on one of the cars which they were attempting to put in place, was not a trespasser, intermeddler, or mere volunteer with respect to such work of repair, but was engaged in forwarding the interest and business of his employer in that part of the business in which such employer and the railway company had a common

interest; and for an injury sustained by him while so engaged, caused by negligence of the servants of the railway company, the latter is liable. *Hendrickson v. Wis. Cent. R. Co.* 179

2. Findings by the jury in such case to the effect that the servants of the railway company were negligent in backing the engine without signal or warning against the empty cars, on one of which the plaintiff was helping to repair the brake, and that plaintiff was not guilty of contributory negligence, are *held* to be sustained by the evidence. *Ibid.*

3. It being undisputed that the engine struck the cars, that the conductor had given no signal for its backing, and that he did not expect it to do so while he and plaintiff were attempting to repair the brake, no prejudice resulted to defendant from the admission of testimony that the conductor stated, after the accident, that "he did not think himself that the engine was going to hit the car," even though such statement was not properly admissible as part of the *res gestæ*. *Ibid.*

4. Generally, the question whether or not it was the duty of a person driving a team to stop before attempting to cross railway tracks is one for the jury, and not one to be decided as matter of law by the court. *Swalm v. Northern Pacific R. Co.* 442

5. Upon the evidence in this case the jury were warranted in finding that the driver exercised ordinary care. *Ibid.*

Same: Injuries to passengers. See TRIAL, 6.

Same: Injuries to employees. See MASTER AND SERVANT, 1.

Same: Obstructions by tracks. See WATERS AND WATERCOURSES.

Same: Injuries to land by fire.

6. In an action against a railway company for injury to land caused by a fire alleged to have been negligently set, the evidence, though somewhat contradictory and unsatisfactory, is *held* to sustain a finding by the jury that the fire was started on the defendant's right of way by sparks from an engine. *Ellison v. Chicago & N. W. R. Co.* 603

RAPE.

1. A conviction of rape is *held* to be sustained by the direct and positive testimony of the prosecutrix, a child between thirteen and fourteen years old of limited intelligence, together with some corroboration, the question of her credibility being one for the jury. *Robinson v. State,* 205

2. Where, on a trial for rape, the prosecutrix testified to only one offense and the testimony of the accused evinced no uncertainty as to the occasion referred to, so that the jury in finding him guilty must have agreed upon the commission of one specific offense, there was no error in an instruction permitting conviction for an offense committed at any time within the period of limitation prior to the time charged in the information. *Ibid.*

3. Where, on a trial for rape, the accused himself testified and also offered other evidence to show the innocent and meritorious character of his relations and usual acts with girls other than the prosecutrix who frequented his place of business, it was permissible for the state to show that the conditions which he sought to prove as suggestive of his innocence did not exist,

and to show that the presence of such girls on his premises, invited by him, was often immoral and libidinous instead of uniformly innocent and conventional as he had sought to prove. *Ibid.*

RATIFICATION. See CORPORATIONS, 11–13. DAMAGES, 3. SCHOOLS AND SCHOOL DISTRICTS, 2.

REAL PARTY IN INTEREST. See ASSIGNMENTS.

REAL PROPERTY. See ADVERSE POSSESSION. BROKERS, 1. CANCELLATION OF INSTRUMENTS. DEDICATION. SPECIFIC PERFORMANCE. TRESPASS. TRUSTS AND TRUSTEES. VENDOR AND PURCHASER. WILLS, 13, 20–23.

REASONABLE DOUBT. See INSTRUCTIONS TO JURY, 5.

REASSESSMENT. See CONSTITUTIONAL LAW, 3–6.

RECORDS. See COUNTIES, 5.

RECOUPMENT. See SALES, 4.

RELEASE.

1. In an action for personal injuries caused by negligence, when the complaint seeks to avoid the effect of a release and the answer sets up the release in bar of the action, the trial court may in its discretion try the question of release first and separately, and may assume, for the purpose of such trial, that but for the release plaintiff has a cause of action. *Charron v. Northwestern Fuel Co.* 437
2. On the trial of such issue considerable latitude of inquiry should obtain, and evidence tending to sustain or impeach the release should not be excluded merely because it is also relevant upon the other branch of the case. *Ibid.*
3. On such a trial it was error to exclude evidence tending to show the effect of plaintiff's injuries upon his mental capacity. *Ibid.*
4. It was also error in such a case to limit cross-examination so as to exclude a question as to former admissions made by the witness in conflict with his testimony and tending to show the mental incapacity of plaintiff. *Ibid.*
5. Evidence *held* sufficient to sustain a finding by the jury that at the time of signing the release plaintiff was incompetent to contract. *Buggs v. Rock County Sugar Co.* 462

REMAINDERS. See WILLS, 23.

RENT. See LANDLORD AND TENANT, 3–5.

REPUTATION. See WITNESSES, 6, 7.

RESCISSION. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 17–28. EQUITY. SALES, 1.

RES GESTÆ. See RAILROADS, 3.

RES JUDICATA. See APPEAL, 1. JUDGMENT.

RETURN. See CONTRACTS, 24.

RIVERS. See ADVERSE POSSESSION, 2. WATERS AND WATERCOURSES.

RULES OF COURT.
Supreme Court Rule 6 (Cases and briefs), 144, 157, 163.
Supreme Court Rule 44 (Costs for printing case), 157, 163.

SALARY. See COUNTIES, 1, 2.

SALES.

Requisites and validity. See CORPORATIONS, 4, 5.

Rescission by seller.

1. Acts of the vendor, after a machine had been returned to his possession by the vendee, in taking it to his own premises for the purpose of caring for it, or in offering a part of it in evidence to show that it was not defective, cannot be considered as acts of ownership which would amount to an acceptance of a rescission of the sale. *Peplinski v. Nichols,* 387

Performance of contract: Delivery and acceptance of goods.

2. Upon receipt, at Waukesha in this state, of a carload of mixed iron sent from Chicago upon a "rush order" and needed for immediate use in its foundry, the vendee, a steel structural company, wrote to the vendor stating that the car was very unsatisfactory and that if they were not entirely out of material they would certainly return it. Two days later the vendee again wrote renewing the complaint and stating that the material sent was not as promised and that a liberal allowance should be made from the price. The car in fact contained about forty per cent. of foreign material, while only about five per cent. was allowable under the contract. *Held,* that under the circumstances the use by the vendee of such part of the material as conformed to the contract did not constitute acceptance of the whole; that the letters mentioned constituted seasonable and sufficient notice that the shipment was not received as a compliance with the contract; and hence that in an action for the contract price the vendee was entitled to recoupment. *Nicoll v. Modern Steel S. Co.* 545

Warranties.

3. A contract under which a corn shredder was sold, providing that if the purchaser was not satisfied with the machine after it had been put in order by an expert he must, in order to obtain the benefit of the warranties, notify the vendor within three days by registered mail that he was not satisfied and that he demanded a competitive trial, and providing also that all warranties except as to free repairs should be considered as fully satisfied unless the purchaser promptly gave such registered notice, and that no oral notice should be substituted therefor,—was plain and unambiguous, and when the purchaser failed to give such stipulated notice he became remediless as to the warranties. *Northwestern Port Huron Co. v. Krubsack,* 527

SCHOOLS AND SCHOOL DISTRICTS.

Exemption from taxation. See TAXATION, 1–6.

School board: Purchases: School orders.

1. Neither sec. 435, Stats. (1898), providing that the school board shall have the care and keeping of the property of the school district, nor sec. 436, authorizing such board to purchase necessary books, blanks, and stationery, gives the board authority to purchase a safe. *Glidden State Bank v. School District,* 617
2. Having no authority to purchase a safe, a school board cannot by ratification validate a void purchase thereof by individual members of the board. *Ibid.*

3. Where payment of a school order has been stopped by the board before action brought thereon, no action can afterwards be maintained on the order, the only remedy being for breach of the contract. *Ibid.*

Appeals to state superintendent: Procedure: Certiorari.

4. Sec. 497, Stats. (1898), is mandatory, and a decision made after the time therein limited is of no effect. *State ex rel. Schuette v. Cary,* 83

5. Where no rule prescribed by the state superintendent under the authority given by sec. 497, Stats. (1898), declares when the hearing of an appeal shall be deemed closed, it will be deemed to have been closed when the last step was taken by the parties for submitting the controversy to him. Such last step in this case consisted of the filing of an answer to the petition of the appellants. *Ibid.*

6. In reviewing upon *certiorari* the proceedings before the state superintendent on an appeal, pursuant to sec. 497, Stats. (1898), from the decision of a town board, the question of the town board's jurisdiction cannot be inquired into, because the superintendent has no power or authority under said section to determine that question. *Ibid.*

7. The rules of procedure prescribed by the state superintendent for the hearing of appeals under sec. 497, Stats. (1898), should provide that the papers, files, and records in the proceedings of the school district or town board be submitted to him, to enable him to ascertain whether he should entertain the appeal on its merits. *Ibid.*

SERVICE OF PROCESS. See COURTS, 3, 4. PROCESS.

SETOFF AND COUNTERCLAIM.

See SALES, 2.

In an action by the assignees of a claim, a counterclaim against their assignor upon which they are not personally liable can be allowed only so far as it offsets the claim sued upon. *Boyd v. Gore,* 531

SHERIFFS.

Liabilities: Actions. See INDICTMENT AND INFORMATION, 1, 4.

1. Mere temporary possession by a sheriff of personal property which he has wrongfully attached as the property of another, and which he does not sell but subsequently turns over, in pursuance of a settlement of the attachment suits, to the duly authorized agent of the person from whom he took it, gives no right of action to the owner against the sheriff for a conversion of the property. *Wing v. Stackhouse,* 343

2. In an action against a sheriff for conversion, under the facts, stated in the opinion, the plaintiffs cannot be heard to say that the sheriff was guilty of a wrongful act in turning over the property according to a settlement agreement. *Ibid.*

SIGNATURES. See WILLS, 2.

SLIGHT NEGLIGENCE. See NEGLIGENCE, 2, 3, 7.

SPARK-ARRESTER. See FIRES, 2, 3. INSURANCE, 5.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 4–9.

SPECIAL VERDICT. See FIRES, 3. INSTRUCTIONS TO JURY, 6. MASTER AND SERVANT, 4. TRIAL, 6–11.

SPECIFIC PERFORMANCE.

Grounds: Contracts enforceable.

1. As a general rule equity will not enforce specific performance of an oral agreement to convey land, although there has been part performance by the purchaser, unless he has taken possession of the land; but, even where possession has not been taken, if the vendor's refusal to convey will work a fraud upon the purchaser and the latter has no adequate remedy at law, specific performance may be enforced. *Henrikson v. Henrikson*, 314

2. Where land is owned by several persons in undivided interests, some of such owners being incompetent, and plaintiff, one of the owners but not in possession, has made valuable and permanent improvements upon the land pursuant to an oral agreement with defendant, also an owner, that in consideration of the making of such improvements defendant would convey his interest to plaintiff, but defendant refuses to convey, equity may compel a conveyance, since defendant's refusal operates as a fraud upon plaintiff and the remedy at law is inadequate. *Ibid.*

3. The remedy at law is inadequate in such a case because the oral agreement, being void under the statute of frauds, cannot serve as a basis for the recovery of damages, and because the implied obligation of defendant to return what he has received under the oral agreement does not go beyond reimbursement of plaintiff to the extent that he benefited the defendant's undivided interest, while as to the other owners there is no basis for a recovery at law. *Ibid.*

STARE DECISIS. See APPEAL, 2.

STATE SUPERINTENDENT. See SCHOOLS AND SCHOOL DISTRICTS, 4–7.

STATES. See FOOD, 1–4.

STATUTE OF FRAUDS. See CORPORATIONS, 4, 5. FRAUDS, STATUTE OF. SPECIFIC PERFORMANCE, 3.

STATUTE OF LIMITATIONS. See PLEADING, 4, 5.

STATUTES.

Amendment and repeal. See MUNICIPAL CORPORATIONS, 7.

1. The provision of sec. 1063, Stats. (1898), that no assessor shall be allowed by his oath or testimony to contradict or impeach any affidavit or certificate made or signed by him as such assessor, is by necessary implication repealed by sec. 1059, Stats. (Laws of 1909, ch. 490), and ch. 371, Laws of 1907 (secs. 925—139, 1060, 1062, Stats.), in so far as it would interfere with performance by the assessor of the new duties imposed by the last mentioned statutes. *State ex rel. M. A. Hanna Dock Co. v. Willcuts*, 449

Mandatory or directory? See SCHOOLS AND SCHOOL DISTRICTS, 4.

Constitutionality. See CONSTITUTIONAL LAW. FOOD, 1–4. MUNICIPAL CORPORATIONS, 4–6.

Construction. See ACTION, 3, 4, 8, 13–15. ADVERSE POSSESSION, 4. BANKRUPTCY, 2. CORPORATIONS, 4. COSTS, 1, 6, 7. COUNTIES,

1–3. CRIMINAL LAW, 9. DEATH, 3. DEDICATION, 5, 7. DESCENT AND DISTRIBUTION. EMINENT DOMAIN, 2, 4. INTOXICATING LIQUORS, 3. LANDLORD AND TENANT, 3. MUNICIPAL CORPORATIONS, 4–7, 10. NEGLIGENCE, 14, 17. SCHOOLS AND SCHOOL DISTRICTS, 1, 4, 5. TAXATION, 1, 3, 7–10. WILLS, 9, 13.

Same: Foreign statutes.

2. A statute adopted from another state is taken with the judicial construction which it had previously received in that state. *State v. Bullen,* 512

STOCK AND STOCKHOLDERS. See CORPORATIONS, 1–9. TRIAL, 4.

STREETS. See DEDICATION, 6. MUNICIPAL CORPORATIONS, 4–9.

SUBSCRIPTIONS. See CORPORATIONS, 5.

SUMMONS. See COURTS, 3, 4. PROCESS.

SUNDAY. See INTOXICATING LIQUORS, 1, 3.

SUPERINTENDING CONTROL. See COURTS, 1–4.

SUPERSTITIOUS USES. See WILLS, 5.

SUPREME COURT. See APPEAL. COURTS, 1–4. JUDGMENT, 4, 5.

SURRENDER. See LANDLORD AND TENANT, 1, 2.

SURVIVORSHIP. See DEATH.

TAXATION.

Constitutional requirements and restrictions. See CONSTITUTIONAL LAW, 2–6. MUNICIPAL CORPORATIONS, 4–7.

Exemptions. See MUNICIPAL CORPORATIONS, 4.

1. The term "association," as used in subd. 3, sec. 1038, Stats. (1898), may include a corporation organized under ch. 86. *St. John's Military Academy v. Edwards,* 551

2. Laws exempting property from taxation are to be construed strictly against the privilege claimed; but strict construction does not mean that the court will not endeavor first to ascertain the true meaning of the words used. It comes into play only when, after such test, there remains ambiguity in the statute. *Ibid.*

3. A school or academy is a scientific or literary association, within the purview of subd. 3, sec. 1038, Stats. (1898), and its property used for educational purposes is exempt from taxation. *Ibid.*

4. The fact that a school charges for tuition and board and derives a profit therefrom does not render the property liable to taxation, when such profits are used in paying debts incurred for building and other school purposes. *Ibid.*

5. The mere fact that such profits of a school corporation were used in 1900 and 1901 to pay dividends to stockholders did not render its property taxable in 1906 or thereafter. *Ibid.*

[6. Whether the property was taxable for the years in which dividends were paid, or would become taxable should the profits again be used to pay dividends or to accumulate a surplus, not determined.] *Ibid.*

Inheritance tax.

7. The inheritance tax imposed by ch. 44, Laws of 1903, is a tax upon the right to receive property,—in other words, a tax on

the transfer or transaction, not on the property itself. *State v. Bullen,* 512

8. For the purposes of the inheritance tax law, personal property has its legal situs at the domicile of the decedent, and the state has power to impose a tax upon the succession or transfer thereof, where the decedent is a resident of the state, although the property was never within the state and although the transfer was made outside of the state. *Ibid.*

9. Under facts, stated in the opinion, a conveyance in trust is *held* to have been made "in contemplation of death," and "intended to take effect in possession or enjoyment after such death," within the meaning of ch. 44, Laws of 1903; and the property, though never brought within this state, must be regarded as having its situs here and must pay the inheritance tax imposed by the laws of Wisconsin. *Ibid.*

10. In such case the liability accrued at the time of the transfer and is therefore not affected by the fact that at the time of the grantor's death the trust property was in another state, with the legal title in a nonresident trustee. *Ibid.*

11. A life insurance policy payable to decedent's wife and which she joined with him in conveying to the trust company, though without relinquishing her rights therein, formed no part of his estate and hence was not subject to the inheritance tax. *Ibid.*

Assessment: Property omitted in former year. See STATUTES, 1.

12. Actual and intentional omission by the assessor to assess a part of certain property under the mistaken notion that such part was not subject to local taxation does not preclude assessment thereof in the following year as omitted property, under sec. 1059, Stats. (Laws of 1909, ch. 490), such omission not being in the nature of a judicial determination of a question of fact. *State ex rel. M. A. Hanna Dock Co. v. Willcuts,* 449

Reassessment. See CONSTITUTIONAL LAW, 3–6.

Purpose of tax: Diversion. See MUNICIPAL CORPORATIONS, 10, 11.

TORTS. See CORPORATIONS, 10–13. DAMAGES. MASTER AND SERVANT. RAILROADS. TRESPASS.

TRESPASS.

See ADVERSE POSSESSION, 2, 4. EMINENT DOMAIN, 3. JUDGMENT, 2, 4. RAILROADS, 1.

1. One who sells and conveys the timber on his own land is not liable for a trespass upon adjoining land committed by the purchaser while removing such timber, unless he aided and abetted the commission of such trespass. *Gerbig v. Bell,* 157

2. Where the vendor of timber on certain land told the purchaser that a fence had been built on what he supposed was the west boundary but that the purchaser should have the line surveyed and satisfy himself, and the purchaser afterwards employed a surveyor who found that the fence was substantially on the true line, the fact that the vendor was present when the survey was made and, with others, shared the expense thereof because he wished to know where the line was, would not, if he acted in good faith, render him liable for a trespass by the purchaser in cutting to the line of the fence, which was not the true line. *Ibid.*

3. Nor could such vendor be deemed to have aided and abetted such trespass merely because, when sued therefor, he denied in his answer that any trespass had been committed, and upon the trial sought to show that the line surveyed was correct. *Ibid.*

4. A grantor who continues in possession of land without demand by the grantee for possession holds in subordination to the grantee's title, and is not liable as a trespasser prior to a refusal to deliver possession on demand. *Munkwitz Realty & Inv. Co. v. Milwaukee,* 230

TRIAL.

Course and conduct in general. See CRIMINAL LAW, 7–9. RELEASE, 1–3.

Reception of evidence. See APPEAL, 10. CORPORATIONS, 5, 6. CRIMINAL LAW, 5, 6. DESCENT AND DISTRIBUTION, 2. FORGERY. INSANE PERSONS, 1, 2. INSURANCE, 10. JUDGMENT, 1, 2. RAILROADS, 3. RAPE, 3. RELEASE, 2, 3. WILLS, 19.

1. It is within the discretion of the trial court, and entirely proper, to permit plaintiff to prove a material fact after defendant has rested, though not properly rebuttal, where proof thereof at the proper time was omitted through inadvertence. *Siemers v. Meeme Mut. Home Protection Ins. Co.* 114

2. Where a defendant expressly consents, even under pressure from the court, to the admission of unsworn testimony of young children, he waives any right to complain thereof. *Robinson v. State,* 205

3. The allowance of leading questions is a matter largely in the discretion of the court, and the exercise of that discretion will not be disturbed except where it is clearly abused. Where the question merely embodies a summary of evidence before given by the witness, its allowance is not error. *Hankwitz v. Barrett,* 639

4. In an action upon a contract to repurchase certain corporate stock sold to plaintiff it was not error to exclude a question asked of defendant as to whether it was his own or the company's stock he was selling, since this did not call for anything which was said or done between the parties, but merely for the conclusion of the witness as to a fact not in issue. *Ibid.*

Taking case from jury: Questions of fact in general. See ACTION, 6, 7. CHAMPERTY AND MAINTENANCE. DAMAGES, 2. FIRES, 2. INTOXICATING LIQUORS, 1, 2. MASTER AND SERVANT, 3. RAILROADS, 4.

Same: Directing verdict. See MASTER AND SERVANT, 4.

Instructions to jury. See ACTION, 7. DAMAGES, 2. HIGHWAYS, 4. INSTRUCTIONS TO JURY. INTOXICATING LIQUORS, 2. NEGLIGENCE, 19. RAPE, 2. WATERS AND WATERCOURSES, 2.

Custody and conduct of jury. See CRIMINAL LAW, 7–9. JURY.

Verdict. See FIRES, 3. INSTRUCTIONS TO JURY, 6. MASTER AND SERVANT, 4.

5. A verdict finding the defendant guilty of having failed to exercise ordinary care and of gross negligence, respecting a single circumstance of a personal injury to the plaintiff, is contradictory and will not support a judgment for the latter. *Astin v. Chicago, M. & St. P. R. Co.* 477

6. A special verdict finding that defendant's brakeman, in assisting plaintiff to ascend the steps of the car, did not exercise ordinary care, and also that in so doing he exerted "force upon plaintiff in a wilful and wanton manner, either intentionally or without any regard to whether she might or might not suffer personal injury through his acts," is uncertain and indefinite, and judgment for plaintiff should not be awarded thereon. TIMLIN, J., is of the opinion that the findings are not inconsistent, and that the latter finding should in this case have been stricken out or disregarded because not within the issues made by the pleadings. *Haverlund v. Chicago, St. P., M. & O. R. Co.* 415

7. A question submitted for special verdict should not ask whether a party is "chargeable" with want of ordinary care, but whether he was "guilty" of such want. *Swalm v. Northern Pacific R. Co.* 442

8. The court may properly refuse to include in a special verdict a question covering a mere evidentiary fact. *Ibid.*

9. Where a question submitted for special verdict asked whether defendant negligently failed to provide a safe working place by putting in a steam cylinder which was "old, weak, thin, and insufficient," and the jury were instructed that if the bursting of the cylinder was caused by a sand hole they should answer such question in the negative, it was not error to refuse to submit specifically the questions whether the accident was caused by sand holes, and whether defendant ought to have known of such defect. *Suess v. J. S. Stearns Lumber Co.* 609

10. Where the verdict as submitted covers the issuable facts in the case, there is no prejudicial error in refusing to submit additional questions. *Ibid.*

11. Where it cannot be ascertained from the whole record what issues may have been considered by the jury in answering questions of a special verdict, such verdict is too uncertain, indefinite, and insufficient to sustain a judgment. *Jacob Johnson F. Co. v. Wachsmuth L. Co.* 632

TROVER AND CONVERSION. See SHERIFFS.

TRUST FUND. See MUNICIPAL CORPORATIONS, 11.

TRUSTS AND TRUSTEES.

Management and disposal of trust property: Public trusts: Who may maintain action. See WILLS, 5–16.

1. The misuser or diversion of trust property does not operate to forfeit the title of the trustee, in the absence of any such express condition in the conveyance to the trustee. *Thorndike v. Milwaukee Auditorium Co.* 1

2. The remedy in such case is a suit in equity by the proper party plaintiff to restrain the unlawful diversion or the misuser of the trust property. Public trusts like those created by the statutes referred to must be enforced in the same manner and by the same persons as are entitled to enforce charitable trusts. *Ibid.*

3. One who has no interest differing from that of any other member of the public in preventing the misuser of such trust property cannot maintain a suit in his own right for the purpose of preventing the misuser. *Ibid.*

4. Where a complaint contains no averment that the action is brought in behalf of the plaintiffs and others similarly situated with respect to the subject matter of the action, and fails to show that the right sought to be vindicated is a public right to which the whole body of the taxpayers only are entitled, but on the other hand sets forth the ownership of the land in question and its platting by the ancestor of the plaintiffs, traces the title from such ancestor, and then avers the diversion or misuser of the trust property apparently as a private wrong to plaintiffs, the action will not be sustained as a class action or an action in behalf of the public, the beneficiaries under the trust mentioned. *Ibid.*

UNDUE INFLUENCE. See WILLS, 1.

USES AND TRUSTS. See TRUSTS AND TRUSTEES. WILLS, 5-16.

VARIANCE. See ACTION, 3. CORPORATIONS, 2.

VENDOR AND PURCHASER OF LAND.

Rights and liabilities of parties as to third persons: Possession: Notice. See TRESPASS, 1-3.

Actual possession of land by one claiming under a land contract is notice of his rights to one obtaining a conveyance from the heirs of the vendor in such contract, and to one taking a mortgage executed jointly by such grantee of the heirs and by a holder of tax deeds of the land; and the mortgage is subject to those rights. *McIntosh v. Bowers,* 74

VENUE.

1. The right to a change of venue in a criminal case, depends upon statute and can only be claimed in the manner and upon the ground provided. *Oborn v. State,* 249

2. The rule that the right to a change of venue in a criminal case is purely statutory, does not exclude the idea that a change by consent is proper. *Ibid.*

VERDICT. See MASTER AND SERVANT, 4. TRIAL, 5-11.

VICE-PRINCIPAL. See MASTER AND SERVANT, 9.

VIEW. See CRIMINAL LAW, 9.

WAIVER. See ACTION, 4. CRIMINAL LAW, 3, 4, 10-12. EMINENT DOMAIN, 5. INSURANCE, 1, 4. NEGLIGENCE, 15, 17. TRIAL, 2.

WARRANTY. See SALES, 3.

WATERS AND WATERCOURSES.

1. In an action for injury to hay by flood waters alleged to have been obstructed and set back by reason of the negligent construction and maintenance of a railway bridge across a river and adjacent bottom lands, the evidence is *held* to support a verdict in favor of the plaintiff. *Goddard v. Chicago, B. & Q. R. Co.* 169

2. In such case the jury were properly instructed, in effect, that in building bridges of this kind the surrounding conditions and the liability of the adjacent property to injury must be considered, and that defendant was bound to know and to take into consid-

eration those things which were apparent and to exercise ordinary care in adjusting the construction of its bridge to the situation. *Ibid.*

3. A railway company in constructing a bridge should anticipate and provide against floods and freshets which, from having been known to occur at longer or shorter intervals, may reasonably be expected to occur again, but need not make provision against unusual or extraordinary floods such as could not be foreseen by men of ordinary experience and prudence. *Ibid.*

WILLS.

Requisites and validity: Execution. See WILLS, 1–3, 17–19.

Same: Undue influence.

1. The decision of the trial court, in a will contest, that the disinheriting of testator's adopted daughter was not induced by undue influence of his wife, is *held* not to be so clearly against the preponderance of the evidence as to warrant reversal. *Will of Parks,* 225

Same: Revocation. See WILLS, 17–19.

Same: Republication. See WILLS, 19.

Probate: Evidence.

2. Proof of the authenticity of the signatures of deceased or necessarily absent attesting witnesses to a will *prima facie* establishes all facts essential to due execution to which the witnesses could depose if present, including the authenticity of testator's signature, whether autographic, by mark, or in the handwriting of another, also his volition in signing and his mental capacity and understanding of his act. *Hawkinson v. Oatway,* 136

3. In such case the inference that testator executed the will with due understanding of its contents is not prevented or overcome by proof that he could not read or write the English language, qualified by the further facts that he had been in this country thirty years, had served in the Civil War, and was a prosperous farmer of average intelligence. *Ibid.*

Construction: Effect of decree assigning estate.

4. A decree of a county court assigning the estate of the testator pursuant to the will does not transfer title or in any way alter the disposition of the property made by the will. *Rowley v. Rowley,* 325

Same: Superstitious uses: Masses: Charitable trusts: Equitable conversion.

5. The doctrine of superstitious uses under the statute of 1 Edw. VI., c. 14, according to which devises for masses were held void, has never obtained in the United States, where there is absolute religious equality. *Kavanaugh v. Watt,* 90

6. A gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons by bringing their hearts under the influence of education or religion, is a "charity." *Ibid.*

7. Masses, as celebrated by the Roman Catholic church, being shown to be public services, not alone for the repose of the souls of deceased persons specifically named, but for the benefit of all mankind, are within the religious or pious uses which are upheld as public charities. *Ibid.*

8. A bequest for masses is therefore a "charitable bequest," and valid as such, even though the masses be designated as for the repose of the souls of specified persons. *Ibid.*

9. Sec. 2081, Stats. (1898), relating to trusts, does not apply to a charitable bequest, and the question whether such a bequest is sufficiently definite and certain must be determined, not with reference to what is required in regard to private trusts, but with reference to the liberal rules for judicial construction applicable to charitable trusts. *Ibid.*

10. A charitable trust is not rendered invalid by indefiniteness as to beneficiaries, if the scheme of charity be sufficiently indicated or a method provided by which it may be ascertained and its objects made sufficiently certain to enable a court to enforce execution of the trust according to the scheme. *Ibid.*

11. In charitable bequests no trustee need be named, as a charity will not be allowed to fail for want of a trustee. The person named in the will to execute the charity will be held to be the trustee and, if necessary that he hold the title for the purpose of carrying out the provisions of the will, he will by implication hold such title. *Ibid.*

12. A testamentary gift for masses for the repose of the souls of certain persons including the testator, such masses to be "said according to the directions of" two persons named, who are appointed "to direct where and when to say said masses," is sufficiently definite and certain. *Ibid.*

13. The fact that property given by will for a public charity consists wholly of real estate, and that no person is named as devisee thereof, does not invalidate the gift, sec. 2075, Stats. (1898), not being controlling in cases of public trusts, where indefiniteness is of the essence of the charity. *Ibid.*

14. Where in such a case the terms of the will cannot be carried out without converting the real estate into personalty, equitable conversion results and the estate of the testator is to be treated as personalty. *Ibid.*

15. Where, under the doctrine of equitable conversion, the property given by a will for a charity is to be treated as personalty, the statute of perpetuities need not be considered, even if applicable to charitable bequests. *Ibid.*

16. *McHugh v. McCole*, 97 Wis. 166, so far as it conflicts with the decision in this case, overruled. *Ibid.*

Same: Implied revocation of bequest: Divorce.

17. After the admission of a will to probate the county court may, on petition, determine whether a certain bequest made therein had been impliedly revoked by subsequent changes in the condition and circumstances of the testator. *Battis v. Montaba*, 234

18. A divorce accompanied by a final division of the husband's property is such a change in his condition and circumstances as impliedly revokes a provision which he had made in his will for his wife's benefit. *Ibid.*

19. In case of such an implied revocation of a will or of a portion thereof, evidence that the testator meant the will to stand as written cannot be received unless it shows a republication. *Ibid.*

Actions to construe wills.

20. Upon application of an infant for sale of her land the county court is authorized to construe a will so far as it is necessary to

determine whether and to what extent the infant is the owner of the land sought to be sold for her benefit. *Rowley v. Rowley,* 325

21. In case the application for sale is made after administration closed and after the estate has been assigned, the county court is not authorized to bring in adversary parties claiming title under the will, but may require as a preliminary that an action for construction of the will against such adversary parties be brought in the circuit court. *Ibid.*

22. A court of equity will not entertain a suit for construction of a will where there is no trust, equitable incident, or other independent ground of equity jurisdiction. *Ibid.*

23. Where an infant claims to own real estate in remainder and a life tenant is in possession and other persons make an adverse claim to this remainder or some interest therein, if the infant desires to have the land sold for her support, she may maintain a suit against such claimants to remove a cloud on her title, and in this suit may have a construction of the will where the claim of such adverse parties rests upon their construction of such will. *Ibid.*

WITNESSES.

Competency: Capacity and qualification: Children. See RAPE, 1. TRIAL, 2.

1. Unless it appears to have been an abuse of discretion, the ruling of the trial court that a child of limited mentality and intelligence was competent to testify will not be held error. *Robinson v. State,* 205

Same: Husband and wife.

2. The rule precluding a husband or wife from being a witness for or against each other, or from disclosing confidential communications, contemplates the existence of a valid marriage. *Oborn v. State,* 249

Same: Transactions with persons subsequently deceased.

3. Testimony as to personal transactions with a person since deceased, inadmissible under sec. 4069, Stats. (1898), is not rendered admissible by the fact that it was taken by deposition before the death of such person. *Boyd v. Gore,* 531

Same: Experts. See EVIDENCE.

Examination. See EVIDENCE, 2-4.

Same: Cross-examination. See RELEASE, 4.

4. The trial court has a broad discretion as to the extent to which details of conversation may be elicited on cross-examination. Limiting the cross-examination in that respect was not an abuse of discretion in this case, the essential parts of the conversations in question being before the court and jury, and the attitude of the witness being sufficiently disclosed to enable them to judge of the weight of her testimony. *Kurowski v. State,* 210

5. It was not an abuse of discretion in this case, upon cross-examination of the accused, to compel him to answer various questions as to his past history in order that the jury might judge of his credibility. *Parb v. State,* 561

Credibility: General reputation or character. See WITNESSES, 5.

6. The privilege of general vilification of a witness by proof of disreputable conduct not connected with the facts on trial should be allowed only in the exercise of judicial discretion, and then only to affect the credibility of the witness, and not to be considered upon the question of guilt or innocence if the witness is also the accused person on trial. *Robinson v. State,* 205

7. Refutation of evidence of the general good character of an accused must be by proof of general reputation or character and not of specific acts. *Ibid.*

WORDS AND PHRASES.

Appropriated by law, in statute. See MUNICIPAL CORPORATIONS, 10.
Arising within this state, in statute. See PROCESS, 1.
Association, in statute. See TAXATION, 1.
Cause of action, in statute. See ACTION, 9, 10.
Charitable bequest. See WILLS, 8.
Charity. See WILLS, 6.
Corn syrup. See FOOD, 7.
Costs of suit incurred, in statute. See COSTS, 2.
County officer. See COUNTIES, 1.
Glucose. See FOOD, 6, 7.
Gross negligence. See NEGLIGENCE, 2, 5.
In contemplation of death, in statute. See TAXATION, 9.
Insanity. See INSANE PERSONS, 5.
Intended to take effect in possession or enjoyment after such death, in statute. See TAXATION, 9.
Ordinary negligence. See NEGLIGENCE, 2, 4.
Scientific or literary association, in statute. See TAXATION, 3.
Slight negligence. See NEGLIGENCE, 2, 3.
Subject of action, in statute. See ACTION, 9, 12–17.
Syrup, in statute. See FOOD, 6.
Transaction, in statute. See ACTION, 9, 11.
Where there is no new trial in the appellate court, in statute. See COSTS, 1.

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